No. 83-1065.

In the

Supreme Court of the United States.

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK AND
THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, A/K/A THE ONEIDA NATION OF NEW YORK, A/K/A THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, A/K/A THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; THE ONEIDA OF THE THAMES BAND COUNCIL; AND THE STATE OF NEW YORK,
RESPONDENTS.

Supplemental Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Appendix A.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and the Oneida Indian Nation of Wisconsin, also known as the Oneida Tribe of Indians of Wisconsin, Inc., and the Oneida of the Thames Band Council, Plaintiffs,	
v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants.	

MEMORANDUM-DECISION AND ORDER [AND JUDGMENT] [OF JULY 12, 1977]

PORT, Senior District Judge.

This case tests the consequences of the failure of the State of New York to comply with the provisions of the Indian Nonintercourse Act, enacted by the first Congres in 1790 and reenacted in substance by subsequent Congresses to the present

date. 25 U.S.C. § 177. Familiarity with the prior opinions in the case is assumed.[1]

In 1795, the State of New York acquired from the Oneida Indians, by an instrument variously denominated as a deed or treaty, 100,000 acres in Central New York. The counties of Oneida and Madison have acquired and now occupy undesignated but small portions of that acreage. The claim made in this case is limited to damages for the use and occupancy during the years 1968 and 1969 of those "parts of said premises [currently occupied by defendants] for buildings, roads, and other public improvements."[2]

The issues can be summed up as follows: (1) Have the plaintiffs established that the transfer of land by the 1795 treaty to the State of New York was in violation of the Nonintercourse Act? (2) Have any of the defenses asserted by the defendants been established? (3) Are the defendants liable to the plaintiffs for damages resulting from defendants' use and occupancy of part of the subject land during 1968 and 1969? The answer to the first question is yes; to the second, no; and to the third, yes.

Although the present owners of the 100,000 acres may have acted in good faith when acquiring their property, such good faith will not render good a title otherwise not valid for failure to comply with the Nonintercourse Act.

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

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[1] *Oneida Indian Nation v. County of Oneida*, 70-CV-35 (N.D.N.Y. November 9, 1971), *aff'd*, 464 F.2d 916 (2d Cir. 1972), *rev'd*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

[2] Plaintiffs' amended complaint ¶ 22.

United States v. Southern Pacific Transportation Co., 543 F.2d 676, 699 (9th Cir. 1976). Furthermore, it is incumbent upon "[g]reat nations, like great men, [to] keep their word." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142, 80 S.Ct. 543, 567, 4 L.Ed.2d 584 (1960) (Black, J., dissenting).

The posture in which this case has been presented is reminiscent of *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942), in which the Second Circuit said:

> Although there is directly before us only one lease, on which the annual rent is but $4, the question is of greater importance because the Nation, by resolution, has cancelled hundreds of similar leases.

Id. at 930. Likewise, the impact of the Oneidas' claim will reach far beyond the boundaries of the present suit. In my initial decision dismissing the claim for lack of jurisdiction, I pointed out that, "it obvious that there are, of necessity, numerous other parties occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom . . . claims could be made." *Oneida Indian Nation v. County of Oneida*, 70-CV-35, slip op. at 9 n. 3 (N.D.N.Y., November 9, 1971).

Nor is the problem limited to this case,[3] this particular land transaction, the Oneida Indian Nation, or even this area.

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[3] The Oneida Nations [*sic*] presently have two other actions pending in this district. *Oneida Indian Nation v. County of Oneida*, 74-CV-187 (N.D.N.Y.) (action for damages challenging some 25 treaties with New York State); *Oneida Indian Nation v. Williams*, 74-CV-167 (N.D.N.Y.) (action for ejectment against 23 landowners).

Other Indian tribes have similar claims[4] in several other states. Litigation brought by the tribes themselves,[5] or by the federal government in their behalf,[6] is already pending. Further suits brought by the United States are imminent. The Department of Justice has alerted the United States Marshal for this district that, unless Congress extends the statute of limitations for such suits beyond July 18, 1977,[7] an action on behalf of the Cayuga and St. Regis Mohawk tribes will be commenced immediately. The Marshal was given this advance notice because it is anticipated that the suit will involve some 10,000 defendants. The potential for disruption in the real estate market is obvious and is already being felt. News reports indicate that title companies have refused to insure titles in areas where Indian land claims exist, even if law suits have not yet been commenced.

The greater part of the disruption and individual hardships caused by litigation such as this could be avoided by seeking solutions through other available vehicles. This in no way is intended to be critical of the plaintiffs' conduct. The trial of this case demonstrated that they have patiently for many years sought a remedy by other means — but to no avail. The aid of the United States as guardian has been sought for the purpose of instituting claims against the State of New York, to challenge not only the 1795 sale but other treaties with the

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[4] These Indian claims have not all been pursued through the orderly mechanism of litigation. *See New York v. White*, 528 F.2d 336 (2d Cir. 1975). *White* arose out of the seizure of land in the Adirondacks by members of the Mohawk and other Indian tribes.

[5] *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780 (D.Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

[6] *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975) (*Passamaquoddy*).

[7] *See* 28 U.S.C. § 2415.

state.[8] The remedy afforded by Congress against the United States for alleged breach of trust has been and is presently being pursued before the Indian Claims Commission.[9] Finally, it is within the power of Congress to dispose of the matter under the constitutional delegation of power.[10]

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[8] *See* Tr. 198-99; Exhs. 46-48, 51. The parties have advised the court that the United States plans to institute a suit on behalf of the Oneidas to prosecute the tribe's land claims. *Compare, Passamaquoddy, supra* note 6.

[9] The progress of the Oneidas' action in the Indian Claims Commission can be ascertained by reference to the opinions of the Commission. *See* 26 Ind.Cl.Comm. 138 (Aug. 18, 1971); 37 Ind.Cl.Comm. 522 (Mar. 19, 1976), and the intervening opinion of the Court of Claims, *United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973).

In their answer, defendants raised as an affirmative defense the pendency of proceedings before the Indian Claims Commission. They allege that, "[t]his issue is presently before the . . . Commission." Defendants' answers ¶ 11. The simple rejoinder to this defense is that the same issue is not before this court and the Commission. The case at bar challenges the validity of the 1795 purchase of Oneida land; it seeks money damages from the defendants, present landowners who allegedly lack valid title to the land. The suit in the Indian Claims Commission charges the United States with breach of its fiduciary duty to protect the Oneidas in land dealings with the State of New York. *United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973). Although these are separate claims, recovery against the United States might well render any other suit academic.

A more important question, whether the Indian Claims Commission was created to provide an exclusive remedy for redress of wrongs to the Indian nations, was not raised by defendants but deserves comment. The Indian Claims Commission was created in 1946 "to right a continuing wrong to our Indian citizens," H.R.Rep.No. 1466, 79th Cong., 2d Sess. (1945); 1946 U.S.C.C.S. 1347, by creating a forum for Indian claims against the United States. The legislative history makes clear that the Commission was to consider only claims against the United States; no intent to supplant Indian claims against other parties, governmental or private, is evidenced. In discussing the nature of the claims to be considered by the Indian Claims Commission, the House Report mentions solely claims against the federal government. *See Id.* Section 1; 1946 U.S.C.C.S. 1350-51.

[10] *See* U.S.Const. art. I, § 8; *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260

The aptness of what was recently said by Chief Judge Kaufman is striking. "As in so many cases in which a political solution is preferable, the parties find themselves in a court of law." *British Airways Board v. Port Authority of New York and New Jersey*, 558 F.2d 75 at 78 (2d Cir. 1977).

I. NATURE OF THE PROCEEDING

The Oneida Indian Nations are suing for damages arising from the allegedly illegal use and occupancy of a part of their aboriginal land. In 1795, the State of New York purchased a large tract of the aboriginal land of the Oneida Nation. Plaintiffs claims that this purchase violated United States treaties and the Indian Nonintercourse Act, 25 U.S.C. § 177. Therefore, plaintiffs contend that the purchase was void and of no effect.

Part of the 1795 purchase is now occupied by the defendant counties. Plaintiffs measure their damages by the fair rental value of such land for the years 1968 and 1969, the period covered by the complaint.

II. BACKGROUND

The action was commenced in 1970. Following a motion for summary judgment by the defendants, this court dismissed the action for lack of federal jurisdiction. It was decided that diversity of citizenship was absent, 28 U.S.C. § 1332, and that federal question jurisdiction was lacking because the case did not "[arise] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a). This court held that the federal question failed to appear on the face of the complaint;

(1941); *cf. Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

it only appeared in anticipation of various defenses. The Court of Appeals affirmed, holding that the jurisdictional claim "shatters on the rock of the 'well-pleaded complaint' rule." *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 918 (2d Cir. 1972). However, the Supreme Court reversed, stating that plaintiffs'

> assertion of a federal controversy . . . rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normaliy and separately protect a valid right of possession.

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 677, 94 S.Ct. 772, 782, 39 L.Ed.2d 73 (1974). Because the "Oneidas assert a present right to possession based in part on their aboriginal right of occupancy", *Id.*, the complaint on its face raises a federal question.

After remand, plaintiffs moved for summary judgment, but the motion was denied summarily. I held that summary judgment was inappropriate in such a complex and far-reaching case; a full exploration of all the facts was in order. However, trial of the issues was trifurcated. The parties agreed to try the issue of liability first, reserving the question of damages and that of liability of the State of New York to the defendant counties for later disposition.[11] Subsequently, the plaintiffs developed their proof, largely through documentary exhibits, in a three day trial. The defendants, relying only on the plaintiffs' proof and the law, submitted no evidence.

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[11] Transcript (Tr.) 8-9.

III. FACTS

The Parties

Originally, there were two plaintiffs, the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin. During the trial, plaintiffs moved to amend their complaint to join the Oneida of the Thames Band Council, a band of Oneidas from Ontario, Canada, as party plaintiffs. The motion was granted.

The three plaintiffs are the direct descendants of the Oneida Indian Nation which inhabited Central New York prior to the Revolutionary War. According to expert testimony, this conclusion is supported by extensive research into the kinship and genealogies of the Oneida Nation. (Tr. 63-66, 163-65). Furthermore, the United States is presently paying annuities, which are owed to the Oneida Nation under the Treaty with the Six Nations, executed on November 11, 1794, to the Oneidas in New York and Wisconsin. The Wisconsin Oneidas receive their payments in cash, and the New York Oneidas in cloth. (Tr. 25-26). Also, the Bureau of Indian Affairs recognizes both the Wisconsin and New York Oneidas as the successors in interest to the Oneida Nation of 1794. (Tr. 26, Exh. 49).

This finding is not disturbed by defendants' allegations that the present leadership of the Oneida Nation of New York is in dispute. Regardless of which individuals hold office within the tribe, the tribe is recognized as the direct descendant of the Oneida Nation which inhabited New York 200 years ago. Nothing else is required.

The defendants are the Counties of Oneida and Madison. The parties agree that the defendants now occupy and claim to be the record owners of part of the aboriginal Oneida land, more specifically, part of that area of Oneida land purchased by New York State in 1795.

Historical Background

The Oneidas' aboriginal land ran from the Pennsylvania border north to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains. (Tr. 69). This region can be described as a band, about fifty miles wide, running north-south through eastern central New York. According to the records of the earliest white missionaries who came to upstate New York, the Oneidas were occupying this land during the early 17th Century. (Tr. 69, 137). They continued to occupy this land until shortly after the birth of the United States.

During the Revolutionary War, the Oneidas fought alongside the Colonists against the British. (Tr. 73). Aside from their service as scouts and their active participation in various battles in upstate New York, the Oneidas performed another valuable function for the Colonies — they prevented the Six Nations or Iroquois from taking a unified stand as allies of the British. (Tr. 73). The Iroquois were the most influential and powerful tribe in the Northeast and had traditionally been an ally of the British.[12] At the outset of the Revolutionary War, the Colonial government sought to secure the neutrality of the Iroquois. Although this result was not achieved, at least the Iroquois did not fight in unison against the Colonists. Because the Oneidas and Tuscaroras allied themselves with the Colonists, the Six Nations put out the council fires and permitted each nation to choose its ally independently.

After the War, the new nation sought to reward and protect its valuable ally, the Oneida Nation. The Treaty of Fort Stanwix, executed in 1784 to make peace with the Six Nations, expressly secured the Oneidas "in the possession of the lands on

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[12] *See F. Cohen, Handbook of Federal Indian Law* 417-418 (University of New Mexico Press reprint of 1942 Ed.) (hereinafter, *Federal Indian Law*).

which they are settled." (Exh. 1).[13] A few years later, in further thanks for their help, the federal government commissioned, post facto, several Oneidas as officers in the United States Army. (Tr. 88, Exh. 11). Twice again, in treaties between the Six Nations and the United States, the federal government secured the Oneidas in the possession of their land.[14]

However, in 1788, because of increasing pressures to open up the Oneidas' land to settlement, the State of New York purchased the great majority of the Oneidas' land from them. They were left with a reservation of about 300,000 acres in the area southwest of Oneida Lake. This reservation is outlined in Exh. 7 and the parties have stipulated that the land involved in this suit lies within the boundaries of this 1788 reservation.

In 1790, Congress passed the first Indian Nonintercourse Act (the Act). That statute prohibited any land transactions with Indian tribes that were not executed by public treaty under the authority of the United States. 1 Stat. 137-38 (Exh. 10). In 1793, the Act was amended into substantially its present form. The gist of the Act remains the same — unless by treaty with the United States or under the authority of the United States, no purchase or grant of land from an Indian tribe "shall be of any validity." 25 U.S.C. § 177.

The 1795 Purchase

By 1795 a conflict had developed between the United States and the State of New York over the State's power to negotiate purchases of land from the Oneidas. The federal policy toward the Oneidas remained the same — the government intended to reward them for past services and to protect them

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[13] Treaty of Fort Stanwix (October 22, 1784) 7 Stat. 15.

[14] Treaty at Fort Harmar (January 9, 1789) 7 Stat. 33 (Exh. 3); Treaty with the Six Nations (November 11, 1794) 7 Stat. 44 (Exh. 4).

from predation by the white settlers. (Exhs. 17, 19). New York, however, desired to purchase the Oneidas' land, along with the land of many other Indian nations within its borders. Secretary of War, Timothy Pickering, wrote to United States Attorney General William Bradford for an opinion on whether or not New York had the power to purchase Indian land without the intervention of the United States government. The Attorney General responded by stating the language of the Nonintercourse Act was "too express to admit of any doubt upon the question." (Exh. 22). The Act applied to New York. In his opinion Bradford did not question New York's right to land ceded to the State by treaty entered into prior to the adoption of the Constitution of the United States. However, as to the land reserved to the Oneidas under those treaties, he held that the Oneidas' rights could not be extinguished except "by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress." (Id.)

Pickering had been informed that New York was attempting to purchase land from the Cayuga, Onondaga and Oneida Nations. In June of 1795, he wrote to Israel Chapin, Jr., Superintendent of the Affairs of the Six Nations, ordering him not to aid New York in these purchases. Chapin was further instructed to warn the Six Nations of the illegality of any such transactions with New York. Finally, noting that New York's Governor Clinton refused to request federal commissioners, Pickering hoped that the situation would improve when the new governor, John Jay, took office. (Exh. 24). The hope remained only a hope. In July, Jay wrote Pickering that "on *this* occasion I think I should forbear officially to consider and decide" whether the "Act of 1 March 1793" was constitutional or whether the conduct of New York violated either the United States Constitution or the 1793 Nonintercourse Act. He observed, however, that under the New York Constitution, transactions with Indian tribes must be pursuant to acts of

the Legislature; that the enabling legislation in this instance was silent "[a]s to any intervention or concurrence of the United States," nor did it "by implication direct or authorize the Governor to apply for such intervention." (Exh. 26). Jay noted that arrangements for the meeting with the Six Nations planned for later that summer were finished "before I came into office." (Id.)

Within a week, however, Jay wrote Pickering and requested the appointment of United States Commissioners to negotiate a treaty between New York and the St. Regis Indians. (Exh. 28). In a letter to President Washington, suggesting that a commissioner be appointed for the treaty with the St. Regis, Pickering pointed out New York's inconsistent policy for negotiating with Indians. The State was complying with statutory requirements for the St. Regis, but refused to do so when dealing with the Six Nations. (Exh. 29). The reasons for these differing approaches are nowhere made specific. However, Dr. Jack Campisi, a professor of anthropology and an expert on the Oneida Nations, suggested why New York acted as it had. He stated that New York perceived a difference in federal treatment of different Indian tribes. Since the Oneidas and the United States had been allies, the federal government felt bound to protect their interests. Tribes that had allied with the British received less federal protection. Consequently, New York complied with the Nonintercourse Act when negotiating with previously hostile Indians, but refused to do so when dealing with the friendly Oneidas. The State feared excessive federal protective intervention in the latter case.

In July, New York purchased the Cayuga and Oneida reservations for sums to be paid annually. The tribes were left with small parcels of land. (Exh. 31). When the New York Commissioners then moved on to the Village of Oneida, intending to purchase the Oneidas' land, Chapin travelled to Oneida hoping to dissuade the Indians from dealing with the State.

(*Id.*). At Oneida, he informed the tribe of the federal government's opinion of the illegality of such a transaction. (Exh. 32). He remained there for nine days and no deal was made. After leaving Oneida, Chapin was informed that the state commissioners left two days later, having been unable to reach any agreement with the tribe. (*Id.*). Late in August, Pickering wrote Chapin and informed him that he had acted properly in warning the Oneidas of the illegality of any purchase by New York. However, Pickering then told Chapin that "having done this much, the business might there be left." (Exh. 33). Chapin was instructed to leave matters as they stood.

Despite another letter from Pickering to Governor Jay, outlining the procedure to be followed under the Nonintercourse Act of 1793 (Exh. 34), the State continued to negotiate with the Oneidas. These negotiations culminated in a sale contrary to the provisions of the Act on September 15, 1795 by the Oneidas of approximately 100,000 acres of their reservation. (Exhs. 6, 35). The papers transferring the land were signed at Albany, which was not within the boundaries of the Oneidas' aboriginal land. (Exh. 35). Although the Six Nations had met with the British at Albany, the Oneida Nation had never before executed any treaty or land transaction there. (Tr. 111a-112a). Another irregularity in the transaction appears from the record. Ordinarily, treaties were entered into by tribal consensus (Tr. 188-89), by unanimous decision of the tribe. In this case, powers of attorney were executed enabling certain individuals, none of them chiefs, to negotiate the transaction at Albany. (Tr. 189). Also, although women were not allowed to speak at the tribal council (Tr. 190), half of those Oneidas signing the power of attorney were women. (Tr. 189). Finally, the names of the sachems and chiefs that appear on the September 15, 1795 document were not the signatures of Oneida chiefs. Rather, the signatories of the documents merely used the traditional Oneida names for their sachems and chiefs. (Tr. 192).

In the opinion of Dr. Campisi, no United States Commissioner was present in Albany when the State purchased this land from the Oneidas. (Tr. 126). Superintendent Chapin's expense account shows no expenses incurred in Albany in September of 1795. (Exh. 36). Defendants have presented no evidence demonstrating or even suggesting that a United States Commissioner was present. There is no record that Governor Jay ever requested a commissioner for this transaction. The only finding permitted by the record before me is that no United States Commissioner or other official of the federal government was present at the September 15, 1795 transaction.

Developments after 1795

After 1795, New York State continued to negotiate with the Oneidas for the purchase of their land. Between 1795 and 1846, 25 treaties were executed between the State and the Oneida Nation. Only two of these treaties were conducted under federal supervision as required by the Nonintercourse Act.[15] By 1846, the Oneidas' landholdings in New York had been diminished to a few hundred acres. (Tr. 267).

The social and economic pressures on the Oneidas naturally resulted in the alienation of their land. (Tr. 127-131). In addition, white settlers living in the areas continually encroached on the Oneidas' land. (Tr. 232-233). Land speculators were always urging the Oneidas to sell their reservations. At the same time, New York began agitating for the removal of the Oneidas and other Indians to western lands.[16] The policy of removal was not universally accepted among the Oneidas, and

[15] *See United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973).

[16] *Federal Indian Law* 420.

the problem was exacerbated by the efforts of outsiders, clergy and advisors, to urge the Oneidas to move west. (Tr. 131). The Oneida Nation was split into several factions by these pressures. As a result, by the 1840's, three distinct bands of Oneidas existed. One band stayed on the remaining Oneida reservation land in New York; one group of almost 600 had settled on about 65,000 acres in Wisconsin; and another group of about 400 had moved to Ontario, Canada.

Unfortunately, the pressures on the Oneidas to part with their land did not cease once removal had been effected. The Oneidas' meager landholdings in New York were reduced further as a result of a New York statute which divided the tribal landholdings and gave the Oneidas an option to sell their land. (Tr. 227). This option to sell, coupled with the state of extreme poverty in which they lived, more or less forced the sale of much of the remaining Indian land. The loss of land in Wisconsin was much more drastic. In 1887, the Dawes Act, or General Allotment Act, was enacted by Congress. (24 Stat. 388, February 8, 1887). This Act broke up tribal landholdings, distributed individual parcels to individual Indian families, and removed restrictions on the transfer of title.[17] Again, because of the poverty of the Oneidas, they then lost their land through sales, tax sales, or mortgage foreclosures. By the time of the depression, the extent of the Wisconsin Oneidas' landholdings had decreased from 65,000 acres to approximately 600 (Tr. 132, 203, 220).

These forces which acted to deprive the Oneidas of their land had a similar adverse impact on the social conditions of the Oneida Nation. After the Revolutionary War, the Oneida Nation was extremely disorganized because of the displacements which had occurred during the many years of fighting, first against the French and later against the British. (Tr. 128). The

[17] *Id.* at 206-17.

tribe was suffering from famine and widespread alcoholism. (Tr. 130). The poverty they then experienced became locked in a vicious circle with the loss of their land. These problems were complicated by the Oneidas' illiteracy. Prior to 1800, at the time the great mass of their land was lost, only a few Oneidas had even a minimal ability to understand English orally. (Tr. 129). None could read or write. This state continued through the early 1800's, during the time of removal. (Tr. 218). In fact, up through the 1950's, a translator was needed at meetings of the Oneida Nation of Wisconsin in order to explain actions of the federal government. (Tr. 225). The modest attempts to educate the Oneidas must be viewed in retrospect, as failures. There were schools established by missionaries on the New York reservation by 1796 and on the Wisconsin land by 1907. (Tr. 264). However, these schools had little or no impact on the Oneidas' illiteracy. It was not until 1928 that the first person graduated from the eighth grade from the mission school for the Oneidas in Wisconsin. (*Id.*).

Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land. These efforts were not documented prior to 1909. However, expert witnesses testified that between 1840 and 1875 the Oneidas often attempted to petition the federal government. (Tr. 234). Usually, such petitioning was conducted through the Oneidas' Indian agent. On one occasion, in 1874, a group of Oneidas travelled from Wisconsin to Albany, New York and consulted with a private law firm. All of these efforts were to no avail. (Tr. 234-38). Between 1909 and 1965, the Oneidas contacted the federal government innumerable times in connection with land claims and other grievances. (*See* Exhibits 54, 55).

IV. PLAINTIFFS' CLAIM

The plaintiffs' claim is uncomplicated. The complaint alleged that from time immemorial down to the time of the American Revolution the Oneidas had owned and occupied some six million acres of land in the State of New York. The complaint also alleged that in the 17[illegible]'s and 1790's various treaties had been entered into between the Oneidas and the United States confirming the Indians' right to possession of their lands until purchased by the United States[18] and that in 1790 the treaties had been implemented by federal statute, the Nonintercourse Act, 1 Stat. 137, forbidding the conveyance of Indian lands without the consent of the United States. It was then alleged that in 1788 the Oneidas had ceded five million acres to the State of New York, 300,000 acres being withheld as a reservation, and that in 1795 a portion of these reserved lands was also ceded to the State. Assertedly, the 1795 cession was without the consent of the United States and hence ineffective to terminate the Indians' right to possession under the federal treaties[19] and the applicable federal statutes. Also alleging that the 1795 cession was for an unconscionable and inadequate price and that portions of the premises were now in possession of and being used by the defendant counties, the complaint prayed for damages representing the fair rental value of the land for the period January 1, 1968, through December 31, 1969. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 663-65, 94 S.Ct. 772, 775, 39 L.Ed.2d 73 (1974) (footnote omitted).

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[18] *See* notes 13 and 14 *supra*.

[19] Plaintiffs claim relief under both the Treaty and the Nonintercourse Act. Since relief is afforded under the statute, it is unnecessary to decide whether the plaintiffs are afforded a claim against these defendants for the alleged treaty violation.

V. NONINTERCOURSE ACT VIOLATION

Since its enactment in 1790 to the present time, the Nonintercourse Act has not materially changed. It is now codified at 25 U.S.C. § 177. It provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Mashpee Tribe v. New Seabury Corp., 427 F.Supp. 899 (D.Mass. 1977) (*Mashpee*), is an action similar to this case. The plaintiff tribe seeks a declaratory judgment establishing its right to certain land in Massachusetts allegedly obtained from it in violation of the Nonintercourse Act. In addressing a motion to dismiss the complaint, the court stated that in order to establish a prima facie case,

> . . . plaintiff must show that:
> 1) it is or represents an Indian "tribe" within the meaning of the Act;

> 2) the parcels of land at issue herein are covered by the Act as tribal land;
> 3) the United States has never consented to the alienation of the tribal land;
> 4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.

Id. at 902.

In considering these four factors, attention will focus principally upon the facts relating to the Oneida Indian Nation of New York.[20]

The Oneida Indian Nation of New York has clearly established itself as a tribe within the meaning of the Nonintercourse Act. It is a tribe presently recognized by the Bureau of Indian Affairs.[21] The New York Oneidas still receive annuities under the 1794 Treaty with the Six Nations.[22] Furthermore, they, and the other plaintiffs as well, are the direct descendants of the Oneida Indian Nation which inhabited the area in question before and after the passage of the first Nonintercourse Act. The Act was intended to protect the Oneida Nation. *See Joint Tribunal* [*sic*] *Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (*Passamaquoddy*).

The land involved is covered by the Act. The land purchased in 1795 was part of an area reserved for the Oneidas in an earlier treaty with New York State and occupied by them at the time of the enactment of the first Nonintercourse Act. The tract was part of the Oneidas' aboriginal land. The Supreme Court has specified that Indian title in their aboriginal land is

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[20] Since this phase of the trial is solely to determine liability, the rights of the individual plaintiffs to share in a recovery can be left for another day.

[21] Tr. 26.

[22] Tr. 25-26.

entitled to federal protection. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-69, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). Furthermore, this land was secured to the Oneidas in three treaties with the United States, including the 1794 Treaty with the Six Nations.[23] The aboriginal home land of the Oneidas, later confirmed in treaties with the United States Government, is certainly land covered by the Nonintercourse Act, 25 U.S.C. § 177. Therefore, a fiduciary relationship exists between the plaintiffs and the United States. *United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973).

The proof clearly establishes that the United States never consented to the 1795 purchase. No United States commissioner was present in Albany when New York consummated this cession.[24] In fact, the federal agent for the Six Nations, Israel Chapin, Jr., had earlier traveled to Oneida to dissuade the Indians from dealing with New York. No evidence of any subsequent treaty or act of Congress ratifying the transaction was offered. The federal consent required by the Nonintercourse Act was not obtained before or after the fact.

Defendants argue that federal consent to this purchase was manifested by the subsequent conduct of the United States government. Defendants first raise the broad claim that the federal policy of removal of the Indians[25] validated the 1795 transfer. This broad argument misconceives the nature of Congressional approval required. Termination of Congressional responsibility under the Nonintercourse Act must be explicit. "[A]ny withdrawal of trust obligations by Congress would have to have been 'plain and unambiguous' to be effective." *Passamaquoddy, supra*, 528 F.2d at 380 (footnote omit-

[23] *See* notes 13 and 14 *supra*.

[24] *See* text *supra* at 12-13.

[25] *See Federal Indian Law* 420.

ted). *See also United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 346, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Adoption of defendants' argument would emasculate the Nonintercourse Act. The policy of removal, in and of itself, did not effect ratification. Neither did the government's alleged awareness of subsequent transactions between the Oneidas and New York State, *see United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973), constitute a ratification of the 1795 purchase. Again, defendants can point to no "plain and unambiguous" expression of federal approval.

Defendants see in the 1838 Treaty of Buffalo Creek[26] and its treatment in *New York Indians v. United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898), "an explicit recognition and implicit ratification"[27] by Congress of the 1795 purchase, among others. They see a mirage rather than an oasis. The federal government's policy of removal began affecting the Oneidas shortly after 1810. Initially, some Oneidas moved to Wisconsin, where they received a large tract of land ceded by the Menominee and Winnebago tribes.[28] Other Oneidas moved to Canada.[29] The Wisconsin land with some exception was later "cede[d] and relinquish[ed] to the United States" in exchange for a large tract of land in Kansas. Treaty of Buffalo Creek, Article 1, 7 Stat. 551.

An examination of the Buffalo Creek Treaty and the *New York Indians* case fails to support the defendants' interpretation. On its face, the Treaty of Buffalo Creek ceded Indian rights in land in Wisconsin only; no mention was made of Oneida land in New York State. Neither is there any mention of the 1795 agreement with New York. This is a particularly

[26] Treaty of Buffalo Creek (January 15, 1838) 7 Stat. 550.

[27] Defendant County of Madison's Post-Trial Memorandum 32.

[28] *See Federal Indian Law* 420.

[29] Tr. 130-32, 163-65.

significant omission in view of the strenuous efforts made by the United States through President Washington and Secretary of War Pickering to enforce compliance with the Nonintercourse Act. (*See* Exhs. 17, 24). In light of the diametrically opposed views of the Governor of New York and the Central Government as to the applicability of the Nonintercourse Act to the 1795 transaction, (*compare* Exh. 22 *with* Exh. 26), it is hardly likely that the Treaty of Buffalo Creek would have ratified the agreement implicitly instead of expressly. Had there been a desire to legitimatize a transaction theretofore regarded as a contravention of the Nonintercourse Act, the opportunity was presented without question by the Treaty of Buffalo Creek. Article 13, headed "Special Provisions for the Oneidas Residing in the State of New York," 7 Stat. 554, not only presented a logical and convenient place for such a provision, but even suggested it if the parties, in fact, had it in mind. Furthermore, there was resistance among the Oneidas to the removal policy initially,[30] and to the arrangements specified in the Treaty of Buffalo Creek. This resistance to removal was a factor that brought about the dispute resulting in the *New York Indians* case.

> The difficult point in the case, in its equitable aspect, is whether the protests of the Indians and their final refusal to remove in 1846 do not estop them from claiming the benefit of the reservation made for them [in Kansas].

New York Indians, supra, 170 U.S. at 28, 18 S.Ct. at 538.[31]

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[30] Tr. 130-32.

[31] Defendants' assertion that the Court of Claims' opinion in *New York Indians v. United States*, 40 Ct.Cl. 448 (1905), established either federal ratification of the 1795 purchase or abandonment of the Oneidas' New York land is equally unsupportable. That opinion merely decided which Indians would participate in the award of damages for the disposition of their reservation in Kansas. The right to such damages had been established by the Supreme Court in *New York Indians v. United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898). The Court of Claims held that the Ontario Oneidas were entitled to share in the recovery. At no point did the court find that the New York Oneidas had abandoned their rights to their land in New York. In discussing the unsuccessful nature of the Treaty of Buffalo Creek, the Court noted that:

> None of the tribes moved or was removed to the country set apart; none of them made a demand or request for removal; some of them positively refused to remove when requested by agents and commissioners of the United States; others of them denied that they were parties to the treaty and averred that it had been procured in their names by corruption and fraud.

New York Indians v. United States, 40 Ct.Cl. 448, 451 (1905).

In a similar context, the Supreme Court refused to infer that Congress extinguished the Walapais Indians' rights in their aboriginal land when it established a new reservation for the Walapais and other Indian tribes.

> We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, [32 S.Ct. 565, 569, 56 L.Ed. 941], the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 353-54, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941) (footnote omitted).

The fourth element is proof that the trust relationship between the Oneidas and the United States was never terminated or abandoned.[32] The uncontradicted evidence establishes that this is so. The Oneidas are today a federally recognized Indian nation.[33] Furthermore, they continue to receive annuities under the 1794 Treaty with the Six Nations.[34] Defendants have introduced no evidence whatsoever of any plain and unambiguous withdrawal of Congress' trust obligations. See *Passamaquoddy, supra*, 528 F.2d at 380.

A prima facie case of violation of the Nonintercourse Act, 25 U.S.C. § 177, has been established.

Two additional points urged by the defendants should be noted. In reliance on *United States v. Franklin County*, 50 F.Supp. 152 (N.D.N.Y. 1943), defendant County of Oneida construes the Nonintercourse Act as exempting from its coverage states "having a right of preemption", such as New York. In the light of later decisions, this holding of *Franklin County* cannot be considered authoritative. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent shall apply in all of the states including the original 13." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670, 94 S.Ct. 772, 778, 39 L.Ed.2d 73 (1974); *see also United States v. Oneida Nation of*

[32] The essential elements of a prima facie case under the Nonintercourse Act trace their ancestry to *Passamaquoddy, supra*. *See Mashpee, supra*, 427 F.Supp. at 902. Obviously, this fourth element was essential to plaintiffs' claim in *Passamaquoddy*, for the main issue there was whether a trust relationship existed between the United States and the Passamaquoddy tribe. Although I entertain doubts as to the need for proof of this element in an action brought by the tribe itself, the question is academic in this case since the trust relationship between the United States and the Oneidas has clearly never been terminated or abandoned.

[33] Tr. 26, Exh. 49.

[34] Treaty with the Six Nations (November 11, 1794) 7 Stat. 44. *See* Tr. 25-26.

New York, 477 F.2d 939, 943-44, 201 Ct.Cl. 546 (1973); *Seneca Indian Nation v. New York*, 397 F.Supp. 685 (W.D.N.Y. 1975).

Franklin County's description of the Act as "at most regulatory, designed to prevent fraud", *Franklin County, supra*, 50 F.Supp. at 156, and that conclusion that the Act, by its terms, does not require the presence of a United States Commissioner at a treaty as "a prerequisite to its validity", *Id.*, is also urged. The plaintiffs contend that a purchase of land in violation of the act is totally void, whether the Indian nation was defrauded or whether the consideration paid for the land was inadequate.[35] The language of the statute and cases which consider other transfers of restricted Indian land compel the conclusion that the statute renders the 1795 purchase void.

The Nonintercourse Act states that no purchase of Indian land, unless made by treaty or convention pursuant to the Constitution, "shall be of *any validity* in law or equity." 25 U.S.C. § 177 (emphasis added). Any person not employed or authorized by the United States Government who even attempts to negotiate such a purchase can be fined. *Id.* The language of Congress is plain. The statute makes no reference to overreaching or fraud or inadequate consideration. By prohibiting all unauthorized dealings with Indians, it cuts off any inquiry into the fairness of such dealings insofar as the validity of the resulting transfer is concerned.

When Indian land has been transferred contrary to the terms of Congressional enactment, the Supreme Court has not hesitated to void the transaction. In *Bunch v. Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290 (1923), a Cherokee Indian

[35] At a pre-trial conference, it was stipulated that inadequacy or lack of consideration is not relevant to either plaintiffs' claims or defendants' affirmative defenses, insofar as issues of liability are concerned. This stipulation does not extend to the damages phase of the trial. (Tr. 7).

leased his land in violation of Congressional restrictions. The Court held the lease void and further held that an Oklahoma statute creating a tenancy-at-will was invalid as applied to the land. In *Ewert v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922), a Quapaw Indian sold allotted land in accordance with a statute permitting alienation but prohibiting any person such as the purchaser, an Indian agent, from having "any interest or concern in trade with the Indians." Rev. Stat. § 2078. The Court held the purchase void and remanded for an accounting. 259 U.S. at 138, 42 S.Ct. 442. *See also Smith v. McCullough*, 270 U.S. 456, 46 S.Ct. 338, 70 L.Ed. 682 (1926). A recent case in the Ninth Circuit concluded that the Nonintercourse Act prohibited the Walker River Paiute Tribe from granting an easement to a railroad. *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976). In 1882, the railroad's predecessor negotiated with the Tribe and bought a right-of-way across its reservation without Congressional authorization. Ninety-four years later the agreement was held invalid.[36]

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

Id. at 699.

The result in the present case may seem equally harsh. Nevertheless, it is the result mandated by the Nonintercourse Act.

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[36] The Ninth Circuit also considered whether or not the railroad acquired a license for its right-of-way under various Congressional statutes granting rights-of-way to railroads. *See United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976).

VI. ABANDONMENT

Defendants argue that the plaintiffs abandoned the land involved in this suit, citing *Williams v. City of Chicago*, 242 U.S. 434, 37 S.Ct. 142, 61 L.Ed. 414 (1917). The facts of that case are instructive. In *Williams*, Pattawatomie Indians ceded their land around Lake Michigan to the *United States* and then moved west. Some fifty years later, they attempted to claim land which had originally been under Lake Michigan but had been reclaimed by the time of the suit. The Supreme Court held that the land under Lake Michigan, along with the rest of the aboriginal Pattawatomie land, had been abandoned. However, *Williams* is inapposite to the present case. The Oneida Indians never abandoned their claim to their aboriginal homeland. The small area of land they now occupy lies within the boundaries of the aboriginal land. Furthermore, they never acquiesced in the loss of their land, but have continued to protest its diminishment up until today.

VII. THE PASSAGE OF TIME HAS NOT BARRED THIS SUIT

The violation of the Nonintercourse Act which gave rise to this suit occurred in 1795. Plaintiffs did not commence this action until 1970, 175 years years later. Defendants argue that the passage of time has barred this suit; they raise the defenses of statute of limitations,[37] laches, adverse possession and bona fide purchaser for value. Despite the extraordinary

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[37] Defendants contend that the action is barred by two of New York's statutes of limitations: the six year statute of limitations governing actions "for which no limitation is specifically prescribed by law", *N.Y.C.P.L.R.* § 213(1) (McKinney 1972); and the one year and ninety day statute of limitations governing actions against a county. *N.Y.Gen.Munic.Law* § 50-i (McKinney 1965).

period of time which has passed, the action is not barred. The suit was commenced within the time permitted by 28 U.S.C. § 2415 which governs actions brought by the United States for or on behalf of Indian tribes. This period of limitations applies also to a case such as this one, brought by Indian tribes in their own behalf. Even assuming the necessity of fashioning a federal statute of limitations, Congress has supplied the model to be followed by Section 2415.

It is quite clear that state statutes of limitations and state laws of adverse possession and laches would not bar a suit brought by the United States on behalf of an Indian nation. Where the United States holds title to land in trust for Indians, adverse possession cannot run against the land. *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938). Restrictions on the alienation of Indian land, which have their origin either in treaties or in land patents, are not weakened by the passage of time. Adverse possession and laches are no defense to a suit by the government to protect restricted land. "It has long been held that adverse possession under a state statute of limitations cannot run against Indians if the land is not alienable by them, so long as such restrictions exist." *United States v. Schwarz*, 460 F.2d 1365, 1371 (7th Cir. 1972); *see United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988; 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). In *Ahtanum*, the Ninth Circuit pointed out the impact of the Nonintercourse Act on these defenses.

> And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This, as pointed out, in *United States v. 7,405.3 Acres of Land*, 4 Cir. 97 F.2d 417, 422, arises out of the provisions of Title 25 U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention.

United States v. Ahtanum Irrigation District, *supra*, 236 F.2d at 334 (footnote omitted).

Similarly, where individual Indians sue to rescind transfers of restricted Indian land, state defenses cannot render the transfers effective. In a suit to declare invalid a transfer of a restricted land patent, the Supreme Court held that laches was inapplicable. *Ewert v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922). Also, in an action for wrongful use and occupancy, a state statute which created a tenancy-at-will was held ineffective where Indian land had been leased in violation of Congressional restrictions. *Bunch v. Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290 (1923). If a transfer of Indian land is void under federal law, *see*, *e.g.*, 25 U.S.C. § 177, it cannot later be made valid by operation of state law.

In the instant case, aboriginal Oneida land was transferred in violation of the Nonintercourse Act, 25 U.S.C. § 177. That statute declares, without any qualification, that no purchase made in violation of the Act "shall be of any validity in law or equity." The language of Congress could not have been plainer. Although this purchase occurred in 1795, it had no validity then nor does it today. New York's statute of limitations and the doctrines of laches, adverse possession, and bona fide purchaser cannot validate this transaction.

This same conclusion has been reached by two other district courts in suits brought to regain Indian land alienated in violation of the Nonintercourse Act. *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976). These cases emphasize the supremacy of federal law, which forbade the transfers, over state statutes which would validate them after the fact. The court in *Narragansett* went further. It noted that the United States, as sovereign, was not subject to these defenses. *See Narragansett*, *supra*, 418 F.Supp. at 805 and

cases cited therein. It reasoned that the Congressional interests in protecting Indian land are the same, whether the United States or the Indians are plaintiffs. Thus, the Indians were permitted to assert the sovereign's interests and the defenses based on the passage of time were held inapplicable. It would be anomalous to permit the government, as trustee for the Indians, to achieve a result more beneficial to the Indians than the Indians could, suing on their own behalf. *See Schaghticoke, supra*, 423 F.Supp. at 785.

This conclusion does not necessarily eliminate the application of any statute of limitations. 28 U.S.C. § 2415[38] provides

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[38] The relevant portions of 28 U.S.C. § 2415 provide:

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgement: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is

a federal statute of limitations for cases brought by the United States for or on behalf of a recognized tribe of American Indians. Actions relating to restricted Indian lands are barred unless brought within 11 years of the date the claim accrued. Any claims which accrued prior to July 18, 1966, the date of the statute's enactment, are deemed to have accrued on the date of enactment. Although Section 2415 does not expressly include suits brought by Indian tribes *in haec verba*, it has been so construed. *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465 (9th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975). Actually, whether the limitations of Section 2415 apply to suits brought by Indian tribes as well as the United States is irrelevant in this case. The plaintiffs' complaint was filed in 1970,

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founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

. . . . . .

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

well within the bar provided by the statute. *See Id.* at 472 (Miller, J., concurring).

VIII. THE UNITED STATES IS NOT AN INDISPENSABLE PARTY

Defendants argue that the case must be dismissed for failure to join the United States as an indispensable party. They contend that the fiduciary relationship between the United States and the Indian nation, along with the general federal interest in Indian lands, requires that the United States be made a party to the action or that the action be dismissed. Neither Rule 19 of the Federal Rules of Civil Procedure, nor the adjudicated cases require such a result.[39] The Court of Appeals for the Tenth Circuit, faced with an almost identical situation, refused to dismiss the action. There, plaintiff Indian nations had sued to recover possession of land that was part of the tribes' communal allotment.

> If we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago. On the other hand, if they are permitted to prosecute the suit, in the absence of the United States, a judgment in favor of the defendants will not bind the United States. Defendants assert that that will result in a continuing cloud upon their titles. But, that is their present situation. So long as the United States fails to commence and prosecute to

[39] For an analysis of the factors to be considered in connection with Fed.R.Civ.P. 19, *see Prescription Plan Service Corp. v. Franco*, 552 F.2d 493 (2d Cir. 1977).

> final judgment, an action to establish the title of the Nations to such lands and to recover possession thereof for the Nations, the title of the defendants will continue to be clouded by the possibility of the United States thereafter bringing such an action. So it comes down to this: If we hold that the United States is an indispensable party, the Nations will be unable to assert their longstanding claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining a judgment in their favor in the instant action.
>
> We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder of the United States, weigh heavily in favor of the Nations.
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> We conclude that final decree determining the title and right to possession as between the Nations and the defendants would not leave the controversy in a situation inconsistent with equity and good conscience.

Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952).

Two recent decisions in cases almost identical to this one, have held that the United States is not an indispensable party. *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976). These decisions were based on a long line of cases which have consistently held that, whenever Indian tribes or individual Indians sued to recover either tribal land

or individual allotments, the United States is not an indispensable party. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968); *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973); *Jackson v. Sims*, 201 F.2d 259 (10th Cir. 1953); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952). *See generally* 3A *J.Moore, Federal Practice* ¶ 19.09[8] at 2325 (2d Ed. 1974).[40]

Defendants cite cases that have reached the opposite conclusion for the general proposition that, whenever title to Indian land is involved, the United States is an indispensable party. *See Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337 (9th Cir. 1975); *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959). However, these cases all involve attempts to burden land adversely to the interests of the Indians or the United States. These cases have found the United States to be an indispensable party because the United States owns the ultimate fee title to such land, and because a judgment adverse to the Indians could impair the rights of the United States in that fee. These cases differ from the instant suit by Indian tribes to recover aboriginal land, and this important distinction has been noted by the Tenth Circuit.

> In *Choctaw and Chickasaw Nations v. Seitz*, [citation omitted] we recognized the distinction between the indispensability of the Secretary of Interior in a suit, the effect of which would alienate Indian land, and the dispensability of the Secretary in a suit, the effect of which would protect Indian land against alienation, particularly where the Secretary refused, refrained or neglected to protect the Indian's interest.

[40] Nor need the United States be joined in an action against third persons by certain Indian nations to establish title to and to recover possession of land constituting part of the unallotted common domain of the nations, or in an action by an Indian tribe to quiet title to lands claimed under a treaty with the United States. 3A *J. Moore, Federal Practice*, ¶ 19.09[8] at 2325 (2d Ed. 1974) (footnotes omitted).

Jackson v. Sims, 201 F.2d 259, 262 (10th Cir. 1953).

Finally, defendants contend that *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975), compels a dismissal here. Defendants assert that *Passamaquoddy* requires a "*judicially*-initiated effort asking that the United States act on the plaintiffs' behalf" as "a prerequisite to any suit alleging noncompliance with the *Nonintercourse Act*." Defendant County of Madison's Post-Trial Memorandum 9. This suggested reading of *Passamaquoddy* lacks support in the facts. It appears to be a case of the wish being father to the thought.

> Whether, even if there is a trust relationship with the Passamaquoddies, the United States has an affirmative duty to sue Maine on the Tribe's behalf is a separate issue that was not raised or decided below and which consequently we do not address.

Passamaquoddy, supra, 528 F.2d at 375. Nor was the right of the tribe to litigate without the intervention of the United States at issue because of the apparent immunity of Maine to suit. *Passamaquoddy* definitely did not require a suit against the United States as a prerequisite to a tribe's suit under the Nonintercourse Act.

Two actions similar to the instant one, both brought in the First Circuit, have found that *Passamaquoddy* did not hold the United States to be an indispensable party. *Mashpee Tribe*

v. New Seabury Corp., 427 F.Supp. 899 (D.Mass. 1977); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

IX. THE STATE OF NEW YORK IS NOT AN INDISPENSABLE PARTY

Defendants contend that the action must be dismissed for failure to join the State of New York as an indispensable party. Defendants argue that, as counties, they hold land only as agents of the State. They further argue that an action against the counties will be binding on the State under the law of agent and principal — thus making the State an indispensable party and requiring the dismissal of the suit. The first premise of this argument, however, is faulty and with that faulty foundation removed, the argument collapses.

New York County Law empowers a county's Board of Supervisors to "acquire by purchase or condemnation and accept by gift real . . . property for lawful county purposes." *N. Y. County Law* § 215(3). The county is permitted to lease such property (*Id.*), build upon it (*Id.*), and "sell and convey all the right, title and interest of the county therein." *Id.* § 215(5). Nothing in the statutes limits the extent of the county's title nor specifies that the county holds property as an agent for the State. Neither do any of the cases cited by defendants state that counties in New York hold title to land as agents of the State. *Village of Kenmore v. Erie County*, 252 N.Y. 437, 169 N.E. 637 (1930) (statute requiring counties to collect taxes for villages struck down as violative of state constitutional provision forbidding counties from incurring debts); *Village of Croton-on-Hudson v. County of Westchester*, 38 A.D.2d 979, 331 N.Y.S.2d 883 (2d Dep't.), *aff'd*, 30 N.Y.2d 959, 335 N.Y.S.2d 825, 287 N.E.2d 617 (1972) (county enjoined from diverting parkland to use as a dump without legislative authorization). One case cited by defendants stated, by way of dicta, that a "county is a mere agent of the State." *County of Cayuga v. McHugh*, 4 N.Y.2d 609, 614, 176 N.Y.S.2d 643, 647, 152 N.E.2d 73, 76 (1958). However, the New York Court of Appeals added that counties, as political subdivisions, have "no power save that deputed to them by [the State Legislature]." *Id.* The language of § 215 of the County Law is clear enough — the State has authorized counties to acquire lands, to hold title to these lands, and to use or dispose of them, within certain limits. *N. Y. County Law* § 215. *See also Cooke v. Mulligan*, 81 Misc.2d 1025, 1026-27, 367 N.Y.S.2d 204, 206 (Sup.Ct. 1975).[41]

Ward v. Louisiana Wild Life and Fisheries Commission, 224 F.Supp. 252 (E.D.La. 1963), *aff'd*, 347 F.2d 234 (5th Cir. 1965), cited by defendants, is inapposite. There, the state was the record owner of the land in question. That land had originally been deeded to the Louisiana Board of Commissioners for the Protection of Birds, Game and Fish. A subsequent statute transferred the land to the State of Louisiana.

Since the defendants are the record owners of the land involved in this suit, and since they hold this land in their own right and not as agents for the State, the State need not be joined. Fed.R.Civ.P. 19(a). Complete relief can be accorded

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[41] All of the properties involved here had already been acquired by Albany County as the result of previously held tax sales — most, if not all, of which were conducted long before the plaintiff was elected to office. As such they must be considered county properties and the County owns them proprietorially and can continue to hold them, sell them or lease them pursuant to the provisions of County Law § 215, or otherwise dispose of them at such times and upon such terms as shall be determined by the County Legislature, with or without advertising for bids, subject only to ultimate approval by a majority vote of that body.

Cooke v. Mulligan, 81 Misc.2d 1025, 1026-27, 367 N.Y.S.2d 204, 206 (Sup. Ct. 1975).

among the present parties; the State cannot be prejudiced in any way by its absence; nor does the State's absence subject any of the parties to possible multiple liabilities. Dismissal under Fed.R.Civ.P. 19(b) is not required. *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977).

Defendants concede that the Eleventh Amendment does not insulate them from suit. They argue that the suit must be dismissed against them, however, because the State cannot be made a party defendant by reason of the Eleventh Amendment. Having already determined that it is not necessary to make the State a party defendant, it is equally unnecessary to consider any argument based on the Eleventh Amendment.[42]

X. FORM OF THE ACTION

Casting about among the old common law forms of action for a label with which to tag the claim in this action, the defendants state, "it is difficult to characterize the nature of the plaintiffs' action." Defendant County of Madison's Post-Trial Memorandum 26. They find the most appropriate to be either the old common law "action for use and occupancy" or "an action for wrongful desseisin" or one "of trespass for mesne profits." The defendants then argue with some force that the complaint does not allege all of the essential elements required for any of these actions. *See Crawford v. Town of Hamburg*, 19 A.D.2d 100, 101, 241 N.Y.S.2d 357, 359 (4th Dep't. 1963); *Kelman v. Wilen*, 283 App.Div. 1113, 131 N.Y.S.2d 679, 680 (2d Dep't. 1954); *see generally* 28 C.J.S. *Ejectment* § 132 (1941); 91 C.J.S. *Use and Occupation* § 3 (1955). There is no need to consider the pleading question posed by this argument.

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[42] In any event, equity and good conscience, as in the case of the United States, would militate against dismissal. Fed.R.Civ.P. 19(b). The State is no more an indispensable party than any other person in the chain of title.

As I said in the initial decision considering the jurisdictional question, "[n]o purpose would be served trying to tack a name on the cause of action asserted." *Oneida Indian Nation v. County of Oneida*, 70-CV-35, slip op. at 3 (N.D. N.Y., November 9, 1971).

To start with, the precise form of this action, which would have been so important at common law, is no longer determinative of the action's outcome. Under the Federal Rules of Civil Procedure, the question is not how plaintiffs have characterized the action, but whether plaintiffs are entitled to relief. "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Fed.R. Civ.P. 54(c). *See generally 6 J. Moore, Federal Practice* ¶ 54.62 (2d Ed. 1976); *10 C. Wright and A. Miller, Federal Practice and Procedure* § 2664 (1973).

> [It] is of no importance at the present time to consider whether the plaintiff's remedy is by replevin, trover, money had and received, or trespass. The real question is whether, under the facts disclosed in the complaint, the plaintiff is entitled to relief. If he is, the court can apply the proper remedy, [under] Rule 54(c) . . ..

Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corp., 28 F.Supp. 586, 588 (W.D.Pa. 1939). *See also Herzog & Straus v. GRT Corp.*, 553 F.2d 789, 791 n.2 (2d Cir. 1977).

Neither can the defendants derive comfort from their contention that the plaintiffs' complaint and proof failed to meet the requirement of state law. "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law . . .." *Oneida Indian Nation, supra*, 414 U.S. at

674, 94 S.Ct. at 781. Referring to the Indian tribes' right of occupancy, the Supreme Court pointed out that such right "sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. . . . [T]hese tribal rights to Indian lands became the exclusive province of the federal law." *Id.* at 667, 94 S.Ct. at 777. Thus, it is of little import that the plaintiffs failed to establish the elements of a state-based cause of action. *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942) (Seneca Indian Nation suit not barred by failure to comply with state law).[43]

The plaintiffs have established a claim for violation of the Nonintercourse Act. Unless the act is to be rendered nugatory, it must be concluded that the plaintiffs' right of occupancy and possession to the land in question[44] was not alienated. By the deed of 1795, the State acquired no rights against the plaintiffs; consequently, its successors, the defendant counties, are in no better position.

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[43] In *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942), the Seneca Indian Nation sued to cancel a 99 year lease of a portion of its land. Defendant lessees first argued that the suit should be dismissed since they had tendered the rent as New York law requires. The Second Circuit refused to apply New York Law. *Id.* at 932. Defendants also argued that according to the common law, the remedy of cancellation was unavailable because plaintiffs had not made a demand for the rent. The court rejected this argument and declined to be bound by "ancient doctrine." *Id.* at 937.

> It follows that we are here at liberty to apply legal rules as to landlord and tenant which comport with the Congressional intent concerning the Senecas.

Id. at 938. The Court of Appeals ultimately remanded the case to the district court for entry of judgment in favor of plaintiffs, on the condition that plaintiffs' offer for a new lease at a more reasonable rent be kept open. *Id.* at 943.

[44] The parties have stipulated that defendants are record owners of part of the land transferred in 1795. (Tr. 6).

In this phase of the trial, the only question to be determined is that of liability.[45] The extent of the liability and the manner in which the relief is to be fashioned remain for another day. *Cf. Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972).

This Memorandum-Decision and Order shall constitute the court's findings of fact and conclusions of law. Fed.R.Civ. P. 52(a).

The court having jurisdiction of the subject matter and the parties hereto, for the reasons herein, it is

ORDERED, that the issue of liability be and it hereby is decided in favor of the plaintiffs and against the defendants; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants be and they hereby are held liable to the plaintiffs by reason of said defendants' occupancy of the land in question during the years 1968 and 1969, all other issues to be determined in a subsequent trial.

The parties have indicated a need for, and the circumstances would seem to compel an appeal from this Order. However, the determination herein does not constitute a final judgment or a judgment which could appropriately be certified for entry as a final judgment pursuant to Rule 54(b), Fed.R.Civ.P. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 681 n.5 (9th Cir. 1976). Therefore, pursuant to 28 U.S.C. § 1292(b), I hereby certify that in my opinion the within Order involves a controlling question of law, i.e. whether a violation of the Nonintercourse Act in 1795 gives rise to a claim against the present record owners of a portion of the involved land. I further certify

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[45] *See* note 11 and accompanying text *supra*.

that an immediate appeal from the Order may materially advance the termination of this and other litigation held in abeyance pending the determination of the issue herein. *See* Rule 5, Fed.R.App.P.

July 12, 1977.

Appendix B.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York and the Oneida Indian Nation of Wisconsin, also known as the Oneida Tribe of Indians of Wisconsin, Inc., and the Oneida of the Thames Band Council, Plaintiffs, v. The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants. Third-Party Plaintiffs, v. THE STATE OF NEW YORK, Third-Party Defendant.	No. 70-CV-35

ORDER [OF MARCH 2, 1981]

EDMUND PORT. Judge

After due consideration of the plaintiffs' motion to strike Section III of the defendants' "PRE-TRIAL MEMORANDUM . . .

ON THE ISSUE OF REMEDIES" and the defendants' opposition, it is

ORDERED, that Section III of the defendants' memorandum on the issue of remedies entitled, "THE ONLY REMEDY PROVIDED FOR BY THE TRADE AND INTERCOURSE ACT IS A ONE THOUSAND DOLLAR CRIMINAL FINE" is hereby stricken as being outside the scope of issues set for briefing in this Court's pretrial order of June 25, 1980 and, further, as being barred by the law of the case.

Alternatively, treating the said Section III as a motion to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted, it is hereby

ORDERED, that the motion to dismiss be and the same hereby is denied and it is further

ORDERED, that the pretrial order dated June 25, 1980 be modified:

1. By extending the time to file initial memoranda as provided in stipulations of the parties, and
2. By extending the time for the filing of reply memoranda until 14 days from the date of this order.

In all other respects said pretrial order is to remain in effect.[1]

/s/ Edmund Port

Senior U.S. District Judge

Dated: March 2, 1981
Auburn, New York

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[1] The deletion of the limiting phrase "under the political question doctrine" from the second stipulation extending the time for briefing was neither called to my attention nor noticed by me. However, since "the issues raised in the defendants' brief do not go beyond the order even as originally phrased",* the deletion is without significance. To remove any doubt the original phraseology is restored.

* Defendants' Opposition to Plaintiffs' Motion to Strike. p. 7.

Appendix C.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

ORDER [OF MAY 18, 1981]

ORDER

The Court having heard the parties on the applicability of the political question doctrine and having dictated its decision on the record and upon all of the proceedings had herein, it is concluded and ordered that the political question doctrine does not preclude the fashioning of a remedy in this case.

/s/ Edmund Port

Senior U.S. District Judge

Dated: May 18, 1981

Appendix D.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

[TRANSCRIPT OF PORTION OF HEARING BEFORE DISTRICT COURT ON MAY 18, 1981, DURING WHICH THE COURT STATES ITS REASONS FOR DENYING THE COUNTIES' MOTION RELATING TO THE APPLICABILITY OF THE POLITICAL QUESTION DOCTRINE]

THE COURT: Miss Locklear, Gentlemen, I think it has probably become apparent from the comments made during the course of the argument what my reaction is to the political question doctrine as applicable to this case. I believe my philosophy has been usually the District Court's job is to decide and

in deciding to briefly tell the parties that did not prevail the reasons in my mind why the decision is as it is. The prevailing party, I think, could care less, usually. If my remarks on the record now, giving you my reasons for deciding as I am, seems somewhat disjointed, it is probably because they are. I have jotted down notes here and there as we have come along and as I have examined your Briefs. The Defendants, it seems to me, have argued principally that this is not a justiciable issue, that it is a political question which the Court lacks power to deal with under the separation of powers. Initially the Defendant took the position that the, and takes the position in its memoranda now, that the Intercourse Act in 1793, which they claim to be applicable to this transaction, by including a provision for a $1,000 forfeiture of penalty and imprisonment of up to 12 months for a violation of the Act provided an exclusive remedy for a violation. They reached that conclusion based on the theory that seems to incorporate more of a pre-emption doctrine as indicated in the recent case of City of Milwaukee against Illinois in the Supreme Court decided April 28th, 1981 than any other. I depart from the Defendant's analysis of that case as it applies to the Oneida case. In that case, the Court, initially in treating the case earlier on a question of original jurisdiction, while finding that the Court lacked jurisdiction nevertheless held that a Common Law claim of nuisance was asserted and that in spite of the presence in various statutes of a number of regulatory provisions regarding the subject matter. Subsequently when City of Milwaukee came up for the second time in which the Court held, in effect, that the area is a matter of Federal concern but had been pre-empted by the Congress, the Congress had by that time enacted a comprehensive plan or program to control the pollution which was the subject matter of the statute Counsel for the Defendants recognized that it was the comprehensiveness of the plan that resulted in the pre-emption by Congress. Congress laid down

in minute detail the conditions that would control leaving nothing for the Court to promulgate, and when the Court went beyond the parameters fixed by Congress, the Supreme Court merely held that Congress had taken the entire area unto itself. Now, to apply that kind of reasoning to a simple statement that merely says, and I am reading from Section 8 of the Trade and Intercourse Act with the Indians 1783, "and be it further enacted no purchase or grant of lands or or have any title or claim thereto from any Indians or nation or tribe of Indians within the bounds of the United States shall be, have any validity in law or equity unless the same be made by a treaty or convention entered into pursuant to the Constitution; that ends the quote. I can't attribute to that simple statement a comprehensive plan for the disposition of claims of invalidity. I think what the Congress has done is establish a policy as they said for the protection of the Indians who were regarded as wards of the United States, regarded like children a policy of protection and it's hard for me to attribute to the Congress a broad statement protecting land transfers of Indians to the extent of making them absolutely void, action of no validity or equity, and yet affording to the beneficiaries of that policy no remedy. Defendants contend that the remedy, that the statute declares a violator to be a miscreant and makes the conviction punishable by a fine not exceeding $1,000 and imprisonment not exceeding 12 months. I think that the crime is broader than what makes a transfer invalid. It's the transfer without the consent in substance without the consent of the United States that becomes invalid, but the misdemeanor consists of even negotiating successfully or unsuccessfully, it's a treaty directly or indirectly for the title of purchase successfully or unsuccessfully and like all crimes, of course, the fine goes to the United States, although in this case it's pointed out if there is an informant one half goes to the informant similar to the Custom Laws. That is an unusual provision from the

early history of the country. To attribute that kind of meanness I think it's mean to say to a people as a ward, as my child that you can't do this if you do it it's void because you're not competent to do it, but if you do it, and some did, and in his discretion feels like prosecuting the person with whom you've dealt, he may do so. As far as you are concerned, buddy, you are out in the cold, somebody else is on your land, you can't bring an action to eject them, you can't get any damages, you've just lost your land. I am not going to attribute to the Congress in what most cases probably have been called speaking with forked tongue. Maybe as the County claimed that is what the Congress intended. If they did, I think it will be more appropriate, more becoming for some Court higher in the hierarchy of the Courts of this one to so declare. As I indicated in the course of the argument, I don't think that the Defendants' intentions are sustained by the history of the Act, sparce though it is. During that period and during the periods of the earlier treaties and subsequent treaties, though glowing statements of protecting the possession in very picturesque language indefinitely, there were statements of the protection that would be afforded the Indian. In the history of the litigation itself, to go back into the legislative history, as I indicated in the Act transferring civil jurisdiction to the State of New York but reserving claims such as this to the Federal jurisdiction, the statement of Congressman Morris I think indicates that it was intended that the Indians have a claim. I think that the fact that statutes of limitations in recent years were enacted to apply to such claims indicate that such claims did exist. You don't apply a statute of limitations to claims of the air, claims that don't exist, and the history of litigation in the Courts indicate that this right to pass on these questions, the question of title, question of right to possession with its allied questions of damages for interruption or interference with that right have existed a long, long time. Johnson-McIntosh which

was referred to in the course of the argument, a case dealing with the transfer of 1775, I believe decided in 1823, dismissed an ejectment action because the Plaintiff derived title which was held to be invalid under it, that would be prior to the Intercourse Act, even, and subsequent cases, United States against Boylin arising in this Circuit in which ejectment was granted and there are a number of cases where the question of title or the invalidity of title by reason of the Trade and Intercourse Act has been determined by the Courts. So that there is a long history of the Courts having exercised this power and I say "exercised" as contrasted with usurped and in this case I think that the Supreme Court itself in reversing the lower Courts on the question of jurisdiction impliedly indicated that such a claim existed. In the absence of a more complete legislative history at the time of the enactment of the first or second Intercourse Act, I can only believe that Congress, instead of attempting or intending to supply an exclusive remedy by means of the fine and imprisonment, intended to impose an additional remedy of a criminal nature for a violation of the statute, a course which is not unusual in a great many areas, I think if anyone wanted to examine the criminal statutes they could find dozens, probably hundreds of crimes which without specification having corresponding civil claims for damages. It comes to mind, I suppose, the horrible instances of people putting razorblades or partial razorblades in candy that's distributed to kids on Halloween, under appropriate circumstances being introduced to inner-state commerce could constitute violations of the Food and Drug Act, mislabeling if they didn't advise of the presence of the razorblades and there is a penalty of the seizure, there is criminal penalties and whatnot. I am sure that wouldn't take the inference, a cause of action away from the damages that he suffers by reason of ingesting one of those pieces of candy and I think you could go on interminably with examples such as that. On the basis of

the complete record in this case, this case has been pending for more years probably than any case in this District. I find no fault with that. I think part of it has been deliberate, part of it has been based on, at least on my part of the nonsupported hope that it would be disposed of. The time I thought would be in favor of that, expressed such a hope in my 1977 Decision but the time has come now — excuse me, I will go back a second — we have had two abortive attempts at getting an Appellate review of these Decisions with reference to liability and one was aborted by the Defendants, by the withdrawal of the appeal in the Second Circuit; the other was aborted after argument by the discovery by the Second Circuit that the Certificate to Appeal under 1292A was improvidently granted. I think the time has come to get a final Decision which will definitely be appealable and which will resolve a number of the questions that have been raised here and which will be applicable to other cases as well as this one. In view of the lengthy time that's been already used in disposing of this litigation, in view of the cases that have actually decided similar cases, in view of the way I see the legislative history and since I feel that the Supreme Court Decision finding jurisdiction impliedly indicated the disposition that I am making here, I'll deny the motion, if it is a motion. It think it was posed more in the form of requesting an Order to Preclude the fashioning of a remedy by reason of the political question doctrine. I will find that the political question doctrine does not preclude the fashion for remedy here and I also feel that in addition to the reasons I have already cited, as I indicated in the course of the argument, that in view of the background, legislative history, the history of decided cases over a long period of time, that if the Defendants should be correct that political question doctrine requires dismissal of this case, that it's more appropriate, becoming that it be done by an Appellate Court. I will prepare a short Order. I request Counsel to adjourn to cham-

bers so that in a more informal atmosphere we can discuss fixing a date for trial or any other housekeeping details that are necessary to bring this to a conclusion. We stand adjourned to chambers.

COURT CLERK: The Court stands adjourned to chambers.

* * *

Appendix E.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

NOTICE OF MOTION TO DISMISS OF DEFENDANTS COUNTY OF MADISON AND COUNTY OF ONEIDA [OF SEPTEMBER 25, 1981]

TO: Arlinda F. Locklear
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20240

Attorney General
State of New York
Albany, New York
12224

Bertram Hirsch
76-17 250 Street
Bellerose, New York 11426

SIRS and MADAM:

PLEASE TAKE NOTICE that upon the memoranda filed herewith, and all other papers and proceedings had herein, the defendants County of Madison and County of Oneida will move this Court, at the United States Courthouse, Auburn, New York, on Monday, October 5, 1981, at 10:00 a.m., or as soon thereafter as counsel can be heard, for the entry of judgment dismissing this case for the following reasons:

I. The 1795 New York State Treaty was validated by the Treaty of June 1, 1798, and the Treaty of June 4, 1802 (which two Treaties had the requisite federal participation and approval) insofar as:

A. the latter Treaties constituted plain and unambiguous ratification of the 1795 cession under *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941);
B. the 1798 and 1802 Treaties ratified the 1795 Treaty under the standard established in *Seneca Nation* v. *United States*, 173 Ct. Cl. 912 (1965);
C. the federal approval of the 1795 cession embodied in the 1798 and 1802 Treaties and in the Congressional

action on the latter two Treaties constitutes incorporation by reference of the 1795 Treaty into federal law; and
D. the approval of the 1795 Treaty embodied in the 1798 and 1802 Treaties and in the Congressional action on the latter two Treaties constitutes termination of the reservation status of all land within the 1795 cession boundaries under *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).

II. The federal common law presumption of a "lost grant" to the land in issue negates any liability on the part of the defendant counties.
III. The 1788 New York Treaty, as confirmed by the 1794 Treaty of Canandaigua, provides prospective federal approval for the 1795 New York Treaty and therefore there is no liability on the part of the defendant counties.
IV. The 1794 Treaty of Canandaigua, in Article VII, provides the sole remedy for the Oneida Nation in the face of the actions of the counties of Madison and Oneida with regard to the land in question, which remedy is a political remedy specifically granted thereby to the President of the United States.
V. This action presents solely nonjusticiable political questions mandating dismissal of the action in its entirety.
VI. The plaintiffs have not proved themselves to be anything other than successors in interest to the Oneida Nation. In the absence of a specific federally approved transfer of the inter-

ests of the Oneida Nation in the land in issue to the plaintiffs, they are not entitled to any relief.

COUNTY OF MADISON and
COUNTY OF ONEIDA
By their attorneys,
/s/ Allan van Gestel

Allan van Gestel
Tobin N. Harvey
GOODWIN, PROCTER & HOAR
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Appendix F.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

ORDER [OF OCTOBER 5, 1981]

The above-entitled action came on for trial before the Court at the United States Courthouse at Auburn, New York on September 14, 15, 16 and 17 and the Court having heard the evidence, and the motion to dismiss at the close of all of the evidence was deferred for argument to October 5, 1981, and the Court having heard and considered the arguments of the parties and having dictated its decision, findings of fact and conclusions of law and having filed additional partial findings of fact and conclusions of law, and upon all of the proceedings heretofore had herein, it is ORDERED:

1. The defendants motion to dismiss be and it hereby is denied;

2. That the Clerk enter judgment in favor of the plaintiffs against the defendant County of Madison in the sum of $9,060, with interest at six per cent per annum from January 1, 1968; and judgment in favor of the plaintiffs against the defendant County of Oneida in the sum of $7,634 with interest at six per cent per annum from January 1, 1968 and

3. That pursuant to the provisions of 54(b) Fed. R. Civ. P. the Court finds and hereby makes an express determination that there is no just reason for delay in the entry of final judgment.

/s/ Edmund Port

Senior U.S. District Judge

Dated: October 5, 1981
Auburn, New York

Appendix G.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al.,	•	
Plaintiffs,	•	
v.	•	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York,	•	
Defendants and	•	
Third-Party	•	
Plaintiffs	•	
v.	•	
THE STATE OF NEW YORK,	•	
Third-Party Defendant.	•	

PARTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW [OF OCTOBER 5, 1981]

1. Parcels 1 and 2 of Exhibit 7* in the liability trial accurately depict the location of the metes and bounds description in Exhibit 6, the 1795 treaty. The land claimed by the defendant counties within said parcels is subject to this action.
2. Exhibit 60 is an accurate transposition of Parcels 1 and 2 on said Exhibit 7 onto a U.S.G.S. base map.

* A copy of Exhibit 7 is attached to defendants' Reply Memorandum on the Issue of Remedies.

Madison County Lands

3. During 1968 and 1969 Madison County claims title to and was in possession of the Champlain Battleground Park, which contains 47.22 acres and is located within the exterior boundaries of Parcels 1 and 2 of said Exhibit 7.
4. The highest and best use of Champlain Battleground Park was a park consistent with its present use.
5. Madison County did not lease out or otherwise receive any monetary profit from its use and occupancy of Champlain Battleground Park during 1968-69.
6. The fair market value of the park during 1968-1969 was $10,600.
7. Madison County claims title to, and during 1968 and 1969 was in possession of a 2.07 acre parcel, which is one of the highest points in the surrounding area. It was used by Madison County as a fire department radio tower, and is located within the exterior boundaries of Parcels 1 and 2 of said Exhibit 7.
8. The highest and best use of the Madison County radio tower was as a site for radio-transmission-receiving purposes in a manner similar to its present use.
9. The fair market value of the Madison County radio tower tract as of 1968-1969 was $1,750.
10. Madison County did not lease out or otherwise receive any monetary profit from its use and occupancy of the radio tower tract during 1968-69.
11. Madison County claims title to, and during 1968 and 1969 was in possession of approximately 63.17 miles of property used as highways located within the exterior boundaries of Parcels 1 and 2 of Exhibit 7.

12. The highest and best use of the subject land used by Madison County as highways depends on the highest and best use of the adjoining land from which it was carved. As of 1968-1969 these uses were agricultural, residential and commercial.
13. Madison County did not lease out or otherwise receive any monetary profit from its use and occupancy of the 63.17 miles of subject highways during 1968-69.

Oneida County Lands

14. Oneida County claims title to, and during 1968 and 1969 was in possession of a 13.128 acre gravel bed that is located within the exterior boundaries of Parcels 1 and 2 of said Exhibit 7.
15. The Oneida County gravel bed is unimproved but has some remaining potential for excavation of gravel and other fill material.
16. The highest and best use of the Oneida County gravel bed was for excavation of gravel, sand and fill material.
17. The fair market value of the Oneida County gravel bed as of 1968-1969 was $7200.
18. Oneida County did not lease out or otherwise receive any ascertainable monetary profits for its use and occupancy of the gravel bed during 1968-69.
19. Oneida County claims title to, and during 1968 and 1969 was in possession of approximately 61.5 miles of land that is improved as highways and that are located within the exterior boundaries of Parcels 1 and 2 of Exhibit 7.

20. The highest and best use of the subject land used by Oneida County as highways depends on the highest and best use of the adjoining land from which they were carved. As of 1968-1969 these uses were agricultural and residential.
21. Oneida County did not lease out or otherwise receive any monetary profit from its use and occupancy of subject highways during 1968-69.

Madison and Oneida Counties

22. The counties of Madison and Oneida, New York, were not in existence in 1795 at the time of the transaction complained of in this action.
23. No evidence has been presented to show that the Counties of Madison and Oneida, New York, acted other than in good faith when they came into possession of the County Land in the claim area subsequent to 1795 and prior to January 1, 1968.
24. None of the improvements which existed on the land claimed by the Counties of Madison and Oneida, New York, in the claim area in 1968 or 1969 existed on that land in 1795.
25. The members of the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band Council were not prevented from using the land which is the subject of this claim during the calendar years 1968 and 1969 in the same manner as the public generally.
26. In connection with the purported sale of land pursuant to the Treaty of 1795, the Oneida Nation received certain compensation from the State of New York.

27. There is no evidence that any of the plaintiffs or their predecessors ever refused or returned any of the payments received for the purported sale of land pursuant to the Treaty of 1795.

PARTIAL CONCLUSIONS OF LAW

1. As this Court determined in its memorandum-decision and order, to the extent the defendant-counties claim title to and possess any part of the lands purportedly ceded by the September 15, 1795 transaction between the Oneidas and New York State, they do so in violation of the Nonintercourse Act. Because the Oneidas' right of occupancy and possession to the land in question was not alienated by the 1795 transaction and has not since been lost, the defendant-counties have illegally claimed title to, used and occupied Oneida land. *Oneida Indian Nation of New York* v. *County of Oneida*, 434 F. Supp. 527, 548 (N.D.N.Y.). Therefore, plaintiffs are entitled to a remedy for the counties' illegal use and occupancy of Oneida land.

2. The fashioning of a remedy for violation of the Non-Intercourse Act is a justiciable federal question and, as in formulating a remedy for violation of any federal prohibitory statute, is to be undertaken with reference to the literal language of the statute and the federal policy reflected in the statute. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Sola Electric Company* v. *Jefferson Electric Company*, 317 U.S. 178 (1942).

See Heckman v. *United States*, 224 U.S. 413, 438-439 (1912).

> Whether these restrictions upon the alienation of the alloted lands had been violated and the alleged conveyances were void, was a justiciable question; and in

order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts.

3. The Nonintercourse Act reflects a dual federal policy: first, the statute is intended to protect Indian tribes from overreaching by third parties in the disposition of tribal land by establishing the United States' trust obligation to oversee all such transactions, *Federal Power Commission* v. *Tuscorora Indian Nation*, 362 U.S. 99, 119 (1962); *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 379 (1st Cir. 1975); second, the statute preserves the United States' sole prerogative to extinguish Indian Title. *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339, 346-48 (1941).

4. The fact that the defendants are political subdivisions of the State of New York is an appropriate consideration in the partial incorporation of state law in the controlling federal law. *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939).

Appendix I.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al.,
Plaintiffs,
v.
The COUNTY OF ONEIDA, New York, and the County of Madison, New York,
Defendants and Third-Party Plaintiffs,
v.
THE STATE OF NEW YORK,
Third-Party Defendant.

NO. 70-CV-35

[TRANSCRIPT OF DECISION OF COURT DICTATED FROM BENCH ON OCTOBER 5, 1981]

DECISION in the above-captioned matter by HONORABLE EDMUND PORT, in the United States Courthouse, Auburn, New York, on October 5th, 1981.

APPEARANCES:
FOR THE PLAINTIFFS: ARLINDA LOCKLEAR, ESQ.
BERTRAM HIRSCH, ESQ.
FRANCIS SKENANDORE, ESQ.
LAWRENCE ASCHENBRENNER, ESQ.
FOR THE DEFENDANTS: ALLAN Van GESTEL, ESQ.
TOBIN M. HARVEY, ESQ.

THE COURT: Miss Locklear, gentlemen, as I indicated at the close of the evidence, I intended, if it was possible, to hear your arguments and to render my Decision on the record following that. I see no reason why that should not be followed.

I have had an opportunity, of course, since the trial to examine the exhibits, to review my notes, where I felt it was necessary, and to review the memoranda that were submitted. I want to thank Counsel for the thoroughness with which this case was prepared and presented to the Court. It was very helpful to me. In fact, speaking of thoroughness, the thoroughness reached the point of reminding me of the tactic which, without meaning to be disrespectful to any Court, I can't say that I wasn't guilty of using when I was practicing law, and, that is, throw anything at the old fool. You don't know what he will pick up if he wants to hold your way.

Some of the arguments, at least to my simple mind, were pretty far out; but I understand the importance of the case and I understand the necessity of making a record that includes every possible or potential argument that can be advocated in favor of either of the parties.

What I am about to place on the record will constitute the findings of fact and conclusions of law, and, of course, what's put on the record now is supplemented by my previous Decisions, all along the line, and by some prepared, written findings of fact and conclusions which I will file with the Court. Those findings and conclusions were largely, if not wholly, derived from the suggested findings of fact and conclusions submitted by Counsel. When I say they were "derived", rather, I culled with various modifications from those suggested findings and conclusions.

Now, throughout my discussion I'll probably refer to the Oneida case. If I do, it encompases the Supreme Court Decision in the case, various Court of Appeals Decisions, and my previous Decisions as they are applicable to the particular circumstances embodied in reference. I think that I ought to probably make a caveat in view of some of the arguments that have been made that I will use the words "ceded" and "conveyance" and words of similar import with reference to the effect and purpose of the 1795 Treaty and by doing so I in no way intend to leave an inference that I'm, by the use of that language, legitimatizing or validating the purported transfers that were made by that instrument and which I held to be invalid and of no effect.

For our purpose at the present time, I think we can treat the trial as having been bifurcated. The first part decided in 1977 by me determined the issue of liability in favor of the plaintiffs and against the defendants. I may state in relation to that, that I thought I made it pretty clear that the plaintiffs had standing and were the proper parties to institute the action. I'm repeating it because the argument was again raised. The trial that occupied a few days recently related to the specific amount of damages, if any, to which the plaintiffs are entitled. Ordinarily, the determination of the amount of damages awarded is regarded as the most important part of a case. Counsel generally look to the last line of the Decision to see how many dollars are involved. In this particular instance, I don't think that's the case. I feel in this case, and I have expressed the feeling before, that the determination that was made in 1977 by me, that the defendants were liable to the plaintiffs, was of much greater importance in the context of the entire problem than the number of dollars that happened to be awarded.

A brief review of the efforts to obtain a definitive Appellate Court ruling before the damage trial might be well at this time.

In 1977, in my Decision holding the defendants liable to the plaintiffs, because the plaintiffs, I found, were occupying the particular subject land in violation of the Non-Intercourse Act, I made certification required under 28 USC Section 1292(b),

that would permit an appeal from that Decision. Reference is made to the Oneida case at 434 F.Supp. 527 at Page 548. The appeal from that particular determination was aborted when the parties stipulated to withdraw the appeal. Considerable time elapsed during which hopefully, I think, I -- I can't speak for anyone else -- thought that it might be possible that some disposition, other than a court disposition, could be made of the issues involved here.

However, that was a hope that remained unfulfilled.

Recently, there was a motion made for a summary judgment based on the determination of the Oneidas' claim before the Indian Claims Commission and in the Court of Claims. In ruling on that motion, which I denied, I again granted the certification to appeal from that Interlocutory Judgment. An application was promptly made to the Court of Appeals for the necessary certification for leave to appeal and it was granted. Unfortunately, from my viewpoint, after the appeal was perfected and argued in the Court of Appeals of this Circuit, that Court dismissed the appeal as improvidently granted so that another opportunity to get a definitive Appellate Court Decision on what I considered to be the important phase of the case, that is, the liability, was missed. I apparently don't give up as readily as I should and still, having that same viewpoint paramount in my mind, urged the parties to attempt to stipulate for the purposes of this trial, only, the amount of damages so that an appeal could go forward promptly.

That suggestion proved impractical. After that, the parties engaged in lengthy preparation for this trial phase, or this damage phase of the trial. That preparation included extensive and extended discovery, including the Freedom of Information Act suit, and an appeal, *County of Madison* vs. *The United States Department of Justice*, 641 F.2d 1036, First Circuit 1981. So that ultimately we have reached this trial of the damage issue which was, which occupied much more time

than I think it should have, and I think I'm responsible for that by reason of the liberality with which I received evidence and ruled on the reception of that evidence. But this case was of sufficient importance so that an appeal should, in my mind, be on the most complete kind of a record.

Some place earlier in this proceeding, I commended the plaintiffs for the manner in which they sought to have this problem resolved. I repeat that commendation. The plaintiffs here have sought to have their rights to the land ceded in the 1795 Treaty determined in the least disruptive fashion to the present owners and occupants of it. They brought this present action in 1970 and some time later, I think, or maybe earlier, designated it as a test case, and rather than seeking ejectment or damages for the almost two centuries of alleged illegal occupancy, they sorted the defendants out, selected the two counties, and sued only for the damages for the use and occupancy of the county lands during 1968-69. This is in sharp contrast to the methods employed in other similar situations, for instance, I had the Mohawk case.

In that case, they applied self-help. The Mohawks merely went up in the Adirondacks, took over a piece of land that they claimed was within their aboriginal land, and seized it and held it by force. That situation is described in *New York* vs. *White*, 528 F.2d 336, Second Circuit 1975. At the same time, New York State instituted an action in this court, various property owners instituted actions in State Courts which resulted in a compromise being reached between the Mohawks and the State of New York, I think, by which some land up in northern New York was transferred to the Mohawks along with various other stipulations, but it was resolved and not in a court; although I'm sure that the State Court's determination and this Court's determination had something to do with the compromise that was ultimately reached.

The plaintiffs make claim in their memorandum in support of the proposed Order and the measure of damages at Page 2 the limited nature of the relief being sought. On Page 2 of that memorandum they state, "The Oneidas do not seek to expand the relief sought beyond the original test case". In their Complaint, the Oneidas sought damages for the counties' illegal use and occupancy of Oneida land during 1968 and 1969.

At the damages trial, the Oneidas intend to offer proof of their proposed measure of damages for the years 1968 and 1969 only. Neither do the Oneidas intend to pursue their right to evict the counties in this action."

So that our issue here was well defined and limited. The specific plots of land occupied by the defendants were not particularized in the trial of the liability issues. The parties, however, stipulated that the parcels occupied by the defendants prior to and in 1968 and 1969 and of which they were and are the record owners and possessors, are part of the land transferred in 1795, that was at Page 6 of the transcript of the liability trial.

Anyone with any experience with litigation knows that it is not unusual for litigants to take extreme positions in furtherance of their respective causes. The parties have done so in this case in relation to the damages. The plaintiffs claim the highest possible amount as damages while the defendants assert damages are non-existent. To me a fair disposition supported by law lies between these extreme positions.

A statement of the law to be applied is not difficult. The parties are in accord that under the Supreme Court Decision in this case the applicable law is the Federal Common Law, "the governing rule of decision would be fashioned by the Federal Court in the mode of the common law." That's from the Oneida case at 414 U.S. at 674. From that point on there's "divergence" of course in the views of the parties. They differed greatly as to how the common law should be fashioned

but they agree, again, that the principal objective in fashioning the applicable law should be "the vindication of Federal preeminence in Indian affairs", Defendants' Reply Memorandum, Page 16.

The parties see the means of vindicating Federal preeminence in quite different ways. The defendants arguing that this can be achieved only "by granting these claimants no relief whatsoever". There is no mistaking the position there. The quote ended with "whatsoever". Defendants' Reply Memorandum on Page 18.

The plaintiffs say vindication requires awarding the highest possible damages as rent computed on the basis of the occupied land with the improvements as they existed in 1968 and 1969. As a fall-back position, the defendants argue that if damages are to be awarded, that the Federal Common Law should be fashioned by the virtual wholesale adoption of New York State law, case law and statutory law both.

In applying that law, the defendants say that any damages sustained by the plaintiffs should be "reduced by the aggregate of the following: (a) The value of all consideration received by the Oneida Nation at the time of the transfer of the subject property in 1795. (b) The value of all subsequent payments received by the Oneida Nation or any of the plaintiffs pursuant to the 1795 transaction, including any annuities received and any capitalized annuity payments made. (c) The value of the use by the plaintiffs themselves including any members of the plaintiff tribal entities of the County lands, roads, and facilities within the claim area during the two-year period at issue." Defendants proposed findings of fact and conclusions of law, page 14.

As was indicated on the oral argument, although I don't think anybody made any computations, that reduction by the aggregate of the items claimed by the defendants would result in a verdict of no damages. As I have indicated the plaintiffs

want a Judgment reflecting the fair market value, the fair rental value, rather, of the lands as of the improved 1968-1969 condition; that is, with the highways built and so forth. And, in addition, damages for "waste or other injuries to the land" with interest at the prevailing rate on prudent investments. Plaintiffs' joint proposed findings of fact and conclusions of law, page 10.

That there was a federal and is a Federal Common Law applicable, I think, is pretty clear. Long before the adoption of our Constitution, the English Common Law recognized an action for damages which is incorporated into our common law, resulting from the unlawful occupation of plaintiffs property. As a matter of fact, I remember, it's over fifty years now so that my recollection is somewhat vague and hazy, but I do remember that in law school in some course, either Real Property or Common Law, I remember the professor talking to us abut a "Trespass Quare Clausum Freight"; that may be what we have here. I am not sure if you have to give it a name, but the principle, however, has been applied in the Federal Courts for ages.

The unlawful use and occupation of land entitles the plaintiffs not only to recover the land but to damages "measured by the reasonable value of the use and occupancy considering its extent and duration", *Utah Power and Light Company* vs. *United States*, 243 U.S. 389-411, 1917. And in dealing with this entire subject, I think it is well to keep in mind what was said in *United States* vs. *Gilbertson, et al.*, 111 F.2d 978-980 (7th Cir., 1940), that "in general statutes passed for the benefit of dependent tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians," citations omitted.

Both parties, as I have indicated, agree that vindication, preservation of the preeminence of the United States in Indian affairs should be the guiding principle behind the fashioning

of a common law remedy. Plaintiffs, of course, have said that in order to fashion appropriate law that their damages should fully compensate them and deprive the defendants of any profits or benefits by reason of their unlawful use of the land.

The defendants say that the only way that this principle of Federal preeminence in Indian affairs can be vindicated, can be achieved, "only by holding that the Oneidas are entitled to no relief whatsoever", Reply Memorandum of defendants on the issue of remedies, pages 16-18.

As I indicated earlier, I find it impossible to accept either of these views.

The defendants also claim that traditionally damages have not been awarded for violations of the Non-Intercourse Act and that violators are not called upon to respond in damages. They also say that by granting them the offsets that they seek would not at all be inconsistent with applicable law or with the vindication of Federal preeminence. They also meet the argument of the plaintiffs that the Counties are bad-faith occupiers by saying that, of course, if New York State was in bad faith, that is one thing; but the sins of the State do not fall on the Counties of the State under these facts.

Their argument, the defendants' argument that damages, again to the claim of lack of implied cause of action. They distinguish the cases that have awarded damages by pointing out that in those cases there were violations of statutes relating to allotments rather than violations of the Non-Intercourse Act. To support that argument, they point out that the allotment cases derive viability from the General Indian Allotment Act of 1887, 25 USC, Section 345. That section is inapposite. All that does is afford District Court jurisdiction over allotment claims. There is no question about the jurisdiction that this Court has. I learned that lesson from the Supreme Court in this case so that nobody can argue jurisdiction here. This Court had jurisdiction and in determining that this Court had

jurisdiction, the Supreme Court, of necessity, found that the Complaint alleged a claim entitling the plaintiffs to relief. That, if not explicit, was certainly implied in the Supreme Court Decision in this case.

The defendants read the Supreme Court Decision as limited to a finding of jurisdiction. But merely assuming, without deciding that a valid claim had been asserted and they quote from *Burks* vs. *Lasker*, 441 U.S. 471, at page 476, Note 5 that the "question whether a cause of action exists is not a question of jurisdiction and, therefore, may be assumed without being decided". The assumption, however, is made on the basis of pleadings alone. There aren't any facts. We have had a trial here. Right or wrong, I've decided that the defendants were liable.

The defendants also argue that many of the cases upon which the plaintiffs rely "do not even award the plaintiff damages or alternatively do so without the benefit of any discussion as to whether there is an appropriate remedy"; Defendants' Reply Memorandum on the issue of damages, page 33.

To my mind it is too late in the day to credit this argument. There are many cases cited in the parties' Briefs and the earlier Opinions in this case that have, in fact, awarded damages. And some of the cases, the more extreme remedy of removal of the illegal occupant has been ordered and in all of the cases the occupant was in a chain of title derived from a conveyance by Indians executed in violation of the statutory restriction on alienation. As a result of which, as it was found in this case, the conveyance was void. For example, *Heckman* vs. *West*, 224 U.S. 413, 1912, *United States* vs. *Boylan*, 265 F.2d 165 and I am sure that you could go on with citations in a string, if you were so inclined.

The defendants in support of their claim that Federal primacy in Indian affairs can only be vindicated by denial of

damages to the plaintiffs present a convoluted thesis. The principle thrust of the argument is a reassertion of the non-justiciability and the lack of implied cause-of-action arguments. These were made earlier. I have ruled adversely to the defendants. Those arguments did not, in my opinion, support a dismissal for failure to state a claim after a trial. They do not support a denial of damages. I think what's been missed here, when you talk about implied causes of action under the Non-Intercourse Act, is that it is not necessary to seek out an implied cause of action. This old common-law action of trespass will do very well. Why be inventive? You're going to invent the wheel all over again. Then defendants go on placing under the rubric of the vindication of Federal preeminence in Indian affairs and presented argument that the Treaties of 1978 and 1802 were offered and received in evidence in the liability trial. There is no argument about that.

But they maintained that those Treaties constitute a ratification of the 1795 conveyance. If I am not mistaken, and I don't think I am, that same argument was presented on more than one occasion earlier as a plain ratification argument. It's now been placed under the requirements for vindication -- it's now been plced under the vindiction argument but it is the same argument dressed up in a new costume. The costume makes it no more effective nor neither does the repetition. That suggests to me -- perhaps I should digress for a minute to just explain that this is a District Court, this is the bottom rung of the hierarchy of the Federal Judicial System. The District Court has not and none other than the Supreme Court has the luxury of refashioning what appears to be existing law by reason of contemporary times or conditions. That luxury resides solely in the Supreme Court of the United States. And in saying that, I recognize that it's necessary to make the arguments here to avail one's self of them in the higher courts. So that while if I appear a little edgy about repetition, it's with a re-

cognition of the necessity for making the arguments here but this argument about the 1798 and 18 -- 1794, 1798, 1802 Treaties are really nothing more than what country lawyers would refer to as incorporation by reference in a Deed. It boils down to the claim that reference in a Deed to a metes and bounds description of the boundry line used in a previous conveyance constitutes a ratification of the validity of the earlier conveyance. It just doesn't add up. All the elements necessary for ratification, I find, are missing.

Further, the matter of ratification is the defense that should have been in, and in fact, was raised in the liability trial. In my Decision in that phase of the case, after finding that the 1795 Treaty was not consented to by the United States, I said, "No evidence of any subsequent treaty or act of Congress ratifying the transaction was offered. The Federal consent required by the Non-Intercourse Act was not obtained before or after the fact", 434 F.Supp. at 538. Nothing has been changed and nothing has been brought to my attention up to this point to change that statement.

The plaintiffs' view of the damages to which they are entitled requires that rent be computed for the subject land with the improvements existing on it from 1968 and 1969, and with all of the profits that would be derived from those improvements; if there were a skyscraper on it, the rent being paid by the tenants, the actual tenants of the space would be part of the damages to which the plaintiffs would be entitled.

The defendants, as I indicated earlier in summing up their arguments, say that any damages that are given to the plaintiffs must have from that sum deducted these other monies they have received and so forth and including the use by the plaintiffs and their members of the roads and other public facilities. In other words, most of us could use these county roads in Madison and Cayuga County without paying anything. As far as the Indians are concerned, they become a toll road; that is about the effect of it.

I think somebody smiled when they threw that one at me. Of course, that position is neither supported by the law or the facts and just on the face of it, it would seem terribly inequitable to deduct the amount that the plaintiffs received for land illegally used by interlopers for almost two hundred years against an award covering approximately one percent of that time. I indicated that I could not adopt either claim as to damages. This is a case, probably, that the Court will have to rely on Gilbert and Sullivan for precedence and "let the punishment fit the crime."

I recognize that plaintiff's argument to vindicate and to give the tribe damages as to means of vindicating the federal supremacy is not treated, at least by them, as a penalty. But it seems to me that the policy of the Non-Intercourse Act in the light of the facts and the claim made here can be done with far less draconian methods.

The plaintiffs argue at some length and with some sincerity, I am sure, that the entitlement to these large damages that they have claimed arise out of the bad faith of the defendants. I recognize that good fairth is not a defense to a common-law action for damages for unlawful use and occupancy of land. However, even under the oldest cases a good-faith occupier was permitted to offset the value of the improvements against the damages, *Green* vs. *Biddle*, 21 U.S. 1, 1823. Plaintiffs say that the State of New York not being an occupant in good faith, and the defendants don't feel it is necessary to defend the State of New York at least on this argument, just say that, that unlike the plaintiffs who claim that the defendant counties, the successors in the chain of title to the State of New York, stand in their shoes.

The defendants say that isn't so. There is no bad faith, and that they don't succeed to the bad faith in the State of New York.

I am inclined to agree with the defendants insofar as the right to occupancy is concerned and no matter what, I don't think it's necessary to treat the counties as bad-faith occupiers for the purpose of assessing and fixing damages. The bad faith consisted of the violation of the Non-Intercourse Act by the State of New York. Counsel have referred to the knowledge on the part of the State of New York of the requirements of the Non-Intercourse Act and the liability trial had much historical data to support that law.

However, there is no evidence to connect the defendants, these two counties, with that act of bad faith; nor is there any other evidence indicating that they were bad-faith occupiers of the land in 1968 or 1969 and, of course, we are not concerned in this case with any other time. As a matter of fact, there is no evidence as to when or how the counties acquired this land. The Wooden Ware case that was referred to by the Counsel as supporting their view, I think is distinguishable on the facts, as I think I pointed out during the argument. In that case, the good-faith purchaser was merely being held in damages for the increment that he received at the hands of the trespasser or the culprit. He wasn't, and the Court didn't fix, liability on him for improvements that he put in, if any, that he put into the wood that he acquired, the timber that he acquired from the trespasser. And while the Supreme Court Decision doesn't show what happened with the particular timber, I don't think you have to have much of an imagination to think that by the time the case reached the courts that it was in some condition other than the posts or logs or whatever that he bought from the Indian trespasser.

The *Russian American Packing Co.* vs. *United States* case, 199 U.S. 570, relied on by the plaintiffs is also inapplicable. In that case the plaintiff seeking recovery with the value of improvements it made on the land was not an occupier in good faith. It "was a mere trespasser in occupying the land without

a shadow of title", 199 U.S. 579. I think the courts have established that in Indian allottee, or tribe seeking to cancel or to declare a conveyance made in violation of the Non-Intercourse Act void, is not required to return the consideration received as a prerequisite to maintaining the action. But as clear as that rule appears to be, even that apparently is not absolute. Even in such a case the Court has not ruled out the possibility that under some circumstances a return of the consideration might be required, *Heckman*, 224 U.S. 447.

And in other cases the Courts have indicated that they are not adverse to ameliorating the harshness of the offset rule under appropriate circumstances if the principle, of Federal supremacy is not disturbed and is equitable. In *United States* v. *Brewer*, 184 F.Supp. 377, District of New Mexico, 1960, although the Court entered an Order of Eviction against the unlawful occupants of Indian land who had erected improvements on it, I think to the extent of some $9,000 which was apparently regarded as substantial in the case, the Court stayed the eviction for six months and also permitted defendants to take as much of the improvements and building materials as they were able to. In *United States* vs. *Forness*, 125 F.2d 928, a case arising in this Circuit in 1942 to which reference was made in my liability Decision, the Court there granted a cancellation of a lease with the Seneca Nation of Indians.

In some facets, this case is reminiscent of that one. That case involved a four-dollar lease but there were hundreds of others. This case involves a relatively small piece of land within a much larger area. In any event, the Court, while entertaining a Decree cancelling the lease because it violated an alienation disqualification, required that the Senecas keep open an offer to lease under different terms for a period of sixty days.

Now, that offer to lease had been earlier made by the Senecas in my mind denying the request to fix the rental on the

basis of the existing proof, that is, highways run into millions of dollars and denying that request is equitable and does not do violence to the principle of Federal supremacy.

In getting down to evaluating the dollar worth of the unlawful use and occupancy of this land for two years, a difficult problem is presented. Of course, it is unique in that it is Indian land and it is unique also in the very differing degrees in which the parties see the damages. The usual case fixing rental isn't a terribly tough chore; experts come in; the building across the street was rented for a certain amount, the building next door was rented for a certain amount during the period; and you get pretty good guidance. But here we are dealing with a much more difficult factual situation but that doesn't mean it can't be done, that it isn't a question that can't be handled. Courts every day put dollar signs on, I think, much greater imponderables. They put a dollar sign on the pain that a plaintiff suffers, pain that nobody else in the world can feel. The Courts that are able to do that, I think, can fix damages with some degree of reasonableness and equity in a case such as this.

I mention that in passing because the argument has been made that this was a matter not only inappropriate for Courts to handle but which Courts were unable to handle. Searching around for a basis upon which to fix damages. This is not an eminent domain case, obviously. Eminent domain, the State or government would be taking the land lawfully and they would be required only to pay due compensation, assuming, of course, the other elements of the taking are met.

Here the taking was unlawful but it still boils down to this: That plaintiffs were entitled to possession the same as any landowner is before an eminent domain and he was deprived of that possession by the conduct of the defendant so that the damages sustained by both plaintiffs can be viewed as substantially the same and, generally speaking, the rules of eminent

domain could be applied here and do justice to the parties. This is by reason of the delicacy or consideration with which the plaintiffs brought on this action with only -- we are only dealing with what amounts to a two-year occupancy or an easement for two years so that that is the view that I would be obliged to take. I can't say that I wasn't confused by some of the evidence concerning the damages and the value. A good deal of it took on the aspects of how many angels can dance on the point of a pin, as far as I am concerned. In fact, one of the witnesses I think aptly described some of the assumptions as "fantasy".

I would endorse that viewpoint. In fact, under the defendants' testimony it was like listening to the story of Rip Van Winkle. Somebody went to sleep in 1795 and woke up it 1968. Maybe I will be Rip Van Winkle when the Supreme Court gets through with this case, I don't know.

In any event, the evidence that I received from the defendants as to the value I gave no weight, practically no weight at all. The approach that I think was fairly presented and from which damages can be determined was the approach used by plaintiffs' experts in what they described as "across the fence value". That is, they looked at the land, not as the defendants' witnesses did, as it existed in 1795, but the plaintiffs looked at it as it existed in 1968-1969. What you find then are a park, gravel pit, a radio tower, roads running through a county. But now would you evaluate these smaller parcels there seems to be little or no dispute about except when we get down to the defendants' blanket evaluation of three or four dollars a year per acre? That was it, and the defendants, of course, --then I am not sure at one time the defendants' expert viewed the entire countryside as it existed in 1795.

In another part of his testimony, I got the impression that he viewed the county lands, envisioned them in 1795 and the surrounding areas in 1968-69. There were two time periods. We

got a dense, some kind of a forest or wilderness running where these roads are, farms, cities, urban communities, what-not on either side. That I think the witness himself called "fantasy".

The approach that was appealing was the approach of the plaintiffs that determined the value of this road and the other properties on the basis of the conditions as they existed; that is, part of this highway, I'm sure, was much more valuable, or I should say, more valuable than other parts and he divided the areas up and alloted to each particular area an evaluation.

He found that the Madison County-Champlain Park consisted of forty-seven acres at $225 an acre and the total value, market value of $10,060. The only evidence -- I don't think there was any evidence; if there was, it came under the catch-all of $30.00 an acre for the defendants' view which I didn't adopt. The rental was fixed at five percent of the value or $530. That figure I accept.

The radio tower, a small item of virtually two acres, was computed to have a fair market value of $1,750 by the plaintiffs' expert and $60.00 by the defendants'. I think that the plaintiffs' expert demonstrated a much sounder base and impressed me as not exaggerating the value of the property and I accept his valuation. He computed the rent at ten percent of that or $175 and that is accepted.

The Madison County roads he found needed three different classifications. He found that there was about 322 acres which would be classified as the highest and best use for agricultural or recreational land and he valued that at $125 an acre. He found fifty-four acres having the highest and best use of residential and three acres having the highest and best use for commercial purposes. These were evaluated at $750 an acre for residential and $1,400 an acre for commercial land, making the total fair market value of $85,000.

The defendants applied, as they did to everything, thirty to forty dollars an acre which I gave no weight. I considered it but I don't think it was deserving of weight based on the supporting basis upon which the valuations were made. All of the experts did agree, however, that in fixing the value of a rental or easement in this area that the uniformly-acceptable standard was to fix it by taking the market value, fair market value, multiplying it by ninety percent and then multiplying by five percent, and that is, five percent of ninety percent of the value, fair market value. Computed on that basis, the $85,000 fair market value for the rental or value of the easement for the two years would be $3,825.

The smaller parcels, the Champlain Park and radio tower, were found to have the highest and best use in accordance with their present use. Under these computations, the plaintiff during the two years has been damages by the unlawful occupancy by Madison County to the extent of $9,060. With reference to Oneida County, the defendants' expert made no appraisal at all, if I recall. If there was an appraisal, it would come under his catch-all thirty-five dollars-an-acre which I cannot accept for the same reasons that I could not accept the defendants' expert with reference to Madison County lands.

The plaintiff found that there was a gravel pit of thirteen-some acres which had a fair market value of $7,200. This is undisputed and accepted. He fixed the fair market value at $550 per year, which is also accepted. I think, which also is undisputed, the defendants' expert said he made no appraisal of the gravel pit.

With reference to the roads, an examination of the area through which the roads run places approximately 400 acres in the agricultural and recreational land highest and best use, 30 acres within a residential highest and best use. The agricultural-recreational land was appraised at $125 an acre, the residential land at $750 an acre; making a toal valuation of

the unimproved land for the Oneida County roads of $72,600. Applying the formula which all of the experts agreed upon would result in $3,267 per year. The total fair market rental value or damages sustained by reason of the Oneida County's unlawful occupancy of the land comes to $3,817, that's treating the highest and best use for the roads, as I have indicated, and the highest and best use for the gravel pit as a gravel pit, a partially-worked gravel pit.

With reference to damages relating to waste from the gravel pit, I recall no testimony. I don't know that anything was taken from the gravel pit during the years in question so that the total damages sustained by the plaintiffs at the hands of Oneida County for two years is $7,634.

We now come to the question of interest. I had no problem with finding that the plaintiffs are entitled to interest. They were deprived of the use of their land during these two years. That deprivation has a dollar figure. And the interest should be part of their damages. The manner of computing the interest raises a problem. The Intercourse Act, the cases to which I have been referred as far as I was able to see, offer no instruction as to how to compute the interest. In this particular case, barring some absolute requirement, I feel it would not be inappropriate to look to the law of the State of New York for guidance. I have done that and I have incorporated New York law as I feel it is applicable and equitable to the verdict here. The defendants are counties. We all know the rules that the Legislature has provided, rules for the fixing of interest in the case of Judgments and claims against counties, against municipalities, under New York General Municipal Law, Section 3(A)2. Interest against municipalities is limited to three percent, except in the cases of condemnation and wrongful death; in which cases it is six percent.

Technically, this is not, as all Counsel seem to agree, well, obviously not a wrongful death and Counsel seem to agree that technically it is not a condemnation suit; however, the rule of

damages in condemnation suits has been referred to, and I think appropriately and I think that the rate of interest to be applied in condemnation suits provides the best guide under the facts of this particular case. The damages here parallel the measure of damages for acquiring temporary easement for road purposes or other purposes. Possession by the municipalities was acquired without the consent of the rightful owner and adapting New York Law of Interest as it relates to claims and Judgments against counties, I think it is appropriate to fix interest at six percent per annum.

There is probably some housekeeping that we should do. There were motions made, or at least one that I can recall, to strike one of the expert's testimony on the value of the appraisal. The motion is denied. As I indicated earlier, this dictation on the record, coupled with some partial findings which I will file with the Clerk, copies of which will be available to Counsel right after the trial, right after my dictation here, together with all of the other Opinions and proceedings in the case constitute the findings of fact and conclusions of law.

I will dictate a very short Order this afternoon directing the Clerk to enter Judgment in favor of the plaintiffs and against the defendant County of Madison in the sum of $9,060 with interest at six percent per annum from January 1, 1968, and a Judgment against the defendant County of Oneida in favor of the plaintiffs in the sum of $7,634 with interest at six percent per annum from January 1, 1968.

Judgment in those sums will be entered forthwith.

Now, can anybody help me, the third party, I haven't thought of looking it up earlier, but the third-party action here has not been disposed of, obviously. Is it necessary for me to make certification of some kind where Judgment is entered against fewer than all of the parties?

MR. Van GESTEL: If your Honor please, Rule 54(b) addresses the situation and it suggests when there are multiple

parties or when there are cross claims or third-party claims in the absence of such a determination by the Court there will be no final Judgment, that is then appealable, so you would have to make a ruling under that particular section.

THE COURT: I will include such a statement in my direction to the Clerk.

MR. Van GESTEL: Your Honor, may I come back to what I had said earlier? However, I think the resolution of the claim offer is purely a matter of law and I would like to file a motion and a Brief so it could be heard.

THE COURT: I am not going to hear argument. I think it is time to, as I said before I guess in disposing of one of the motions, time to get this show on the road. That is what we are going to do. This is a Final Judgment from which an appeal can be taken.

Anything further?

MS. LOCKLEAR: No, your Honor.

THE COURT: Well, I don't suppose there is that much urgency. The Clerk will, of course, forward his Judgment card or whatever he does in relation to the entry of Judgment. I want to thank Counsel again.

Stand in recess.

The Clerk will return all the exhibits to the parties who supplied them. The parties can make them available to any Appellate Court. They won't get lost again that way.

COURT CLERK: Court stands in recess.

CONCLUSION OF PROCEEDINGS

• • • •

Appendix J.

Notice of Judgment [of October 5, 1981]

CLERK'S OFFICE
United States District Court
FOR THE
Northern District of New York

Oneida Indian Nation of N.Y.,
et al
vs. Civil Action No. 70-CV-35
County of Oneida, et al

There was entered on the docket Oct. 5, 1981 an order & (judgment) in favor of plaintiffs & against County of Oneida in sum of $7,634 & against County of Madison in sum of $9,060 - both w/int. at 6% per annum from 1/1/68. JR. SCULLY, CLERK

Appendix K.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al.,	*	
Plaintiffs,	*	
v.	*	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York,	*	
Defendants and	*	
Third-Party	*	
Plaintiffs	*	
v.	*	
THE STATE OF NEW YORK,	*	
Third-Party Defendant.	*	

ORDER [OF MAY 5, 1982]

EDMUND PORT, Judge

The State of New York third-party defendant having moved to dismiss the third-party complaints of the County of Oneida, New York and the County of Madison, New York, and the County of Oneida, New York, third-party plaintiff and the County of Madison, New York, third-party plaintiff each having moved for summary judgment in its respective favor against the third-party defendant State of New York; and the plaintiffs having moved for leave to appear and file a memorandum as amicus curiae in support of third-party plaintiffs'

claim for indemnity and the Court having heard counsel for all parties and having dictated its decision on the record, upon all of the proceedings had herein it is

ORDERED, that the motion of the State of New York, third-party defendant to dismiss third-party complaints against it be and the same hereby is denied and it is further

ORDERED, that the motion of the County of Oneida, New York, third-party plaintiff and the motion of the County of Madison, New York, third-party plaintiff for summary judgment in favor of each county against the State of New York, third-party defendant be and the same hereby are granted and it is further

ORDERED, pursuant to the consent of all parties that the plaintiffs be and they hereby are granted leave to appear as amicus curiae and it is further

ORDERED, that judgment in accordance herewith be agreed upon by the parties and filed with the Court within fifteen days from the date hereof or judgment may be settled upon five days notice. The attorney for the third-party plaintiffs is to draw a proposed judgment and submit it to the attorney for the third-party defendant for approval.

/s/ Edmund Port
Senior U.S. District Judge

Dated: May 5, 1982
Auburn, New York

Appendix L.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

[TRANSCRIPT OF DECISION OF COURT DICTATED FROM BENCH ON MAY 5, 1982]

Transcript of a Decision taken on May 5, 1982, at the United States Courthouse, Auburn, New York, before the HONORABLE EDMUND PORT, United States District Court Judge in and for the Northern District of New York, presiding.

APPEARANCES:

FOR THE PLAINTIFFS: (Oneida Indian Nation of New York) — ARLINDA F. LOCKLEAR, ESQ.

FOR THE DEFENDANT and THIRD-PARTY PLAINTIFF: (County of Oneida, et al) — ALLAN VAN GESTEL, ESQ.

FOR THE THIRD-PARTY DEFENDANT: (State of New York) — ROBERT ABRAMS, Attorney General of the State of New York,

By: JEREMIAH JOCHNOWITZ, ESQ.,
Assistant Solicitor General,
Of Counsel.

THE COURT: All right, Miss Locklear, Gentlemen, you people have all appeared before me on previous occasions and you know that my usual custom is to dictate my Decision on the record following the argument, or following a brief interval after the argument, in order to give me an opportunity to study any new material that might have been presented during the argument.

On this occasion, I want to compliment counsel on their presentation because there was, the matter was so completely covered in the Briefs that I think it left little new for counsel to explore in the oral arguments. I don't feel it is necessary for me to write or speak very much about this. If the case requires further proceedings, as it appears it will, I am sure that the Courts above will have plenty to say. In any event, realistically we all know that all I am doing is shooting the starter's gun. The determination at the finish line will result from a Decision other than this Court's.

It makes me think of Lincoln's Gettysburg address where he said, not realizing the impact of what he was saying at the time, that the world would little note nor long remember what we say here. Well, I think we can literally apply it. The important things will be said subsequently. The lawyers are intimately familiar with the background of this case; they've, some of you, have lived with it from its inception, as I have. Others are second generation. I guess the case has got a life of its own.

Very briefly, in the second part of the trifurcated trial that we had in this case, I found that the Plaintiffs were entitled to a Judgment in the sum of some $16,000-plus against, some part against the County of Oneida and part against the County of Madison for the occupation of various lands within those counties resulting from a violation of the Non-Intercourse Act of 1793.

The parties in the third phase of the trial, which we are not engaged in, which is a claim-over by the Counties against the State -- the parties agree that the claim based on indemnity presents no factual issues and can be decided upon the two motions that are presently before me.

The Third-Party Defendant, the State of New York, relies mainly, at least, on the State's sovereign immunity and the bar of the Eleventh Amendment as grounds for the dismissal of the claim against them.

In argument, I think it is fair to say that the State concedes that absent a waiver there would be jurisdiction. I say, "Absent a waiver". I am talking about a complete waiver to sue in the Federal Courts as well as the State. As I indicated during the argument, treating the State's claims generously, I think it can be said that they further claim, or they did further claim that indemnity does not lie, although it hinged to the subject matter jurisdiction, it seems, but they seem to take the position that you are barking up the wrong tree, Counties, because you

are talking about a claim that arises out of our acquisition in violation of the Non-Intercourse Act whereas in truth what you are complaining about relates to our disposition of the land rather than our acquisition. And it argues that the claim is a matter of State law and not Federal law which would result in a failure of Federal jurisdiction, Federal question jurisdiction.

The County, on the other hand, lays it claim principally on three statutes, two State statutes and one Congressional enactment. They say that the State has waived its immunities through the enactment of Section 1541 of the Real Property Actions and Proceedings -- does that end with an Act?

MR. VAN GESTEL: Law.

MR. JOCHNOWITZ: Law.

THE COURT: -- Law. And Section 10 of the State Law of New York and they additionally point to 28 U.S.C. Section 1362 as the basis of waiver. The Counties contend that it is entitled, or they are entitled to indemnification because, otherwise, the State would be unjustly enriched. They also put forward the contention that the Counties' violation found by the Court was in the nature of a technical violation resulting from their mere occupancy, possession of the land, whereas the State is the real culprit having initially violated the Non-Intercourse Act as the Court found.

As I indicated, I can see, I was going to say imagine, but I won't. I can see in the State's Brief that they say there is no right to indemnification but getting down to the core of the matter, the State stresses more strongly the immunity of the State which in turn revolves on whether or not there is a waiver of immunity to this suit.

In addition to the statutes, the Counties, en passante, almost whispered somewhere in their Brief that a waiver could result from, and I am quoting now, "Congress acting pursuant to the authority delegated to it by the States under the Federal

Constitution." Fitzpatrick -vs- Bitzer, 427 U.S. 445 (1976) . . . or by a particular course of conduct such as engaging in interstate commerce. Parden -vs- Terminal Railroad of Alabama, 377 U.S. 184 (1964." Memorandum of the County in support of the Motion For Summary Judgment, hereinafter the Counties' Memo, if I refer to it, at Page 9. Then lastly the Counties assert that since the Third-Party Complaint is within the ancillary as distinguished from the pendent jurisdiction of the Court, independent Federal jurisdiction is not necessary to support the third-party claim.

After a careful consideration of the Briefs and a review of the pertinent cases, I have concluded that the motion of the State to dismiss the third-party claim should be denied and the cross-motion of the Counties seeking indemnification should be granted.

Jurisdiction over the main action is unquestioned. The Supreme Court decided that. Otherwise we wouldn't even be here. The claim for indemnity obviously arises out of the same core of facts as the original claim, that is, the violation of the Non-Intercourse Act. Consequently, ancillary jurisdiction of the third-party action for indemnity exists, Dery -vs- Wyer, 265, F.2d, 804 (2nd Cir. 1959). Cited as authority in the Counties' Brief is the controlling law in this Circuit and has been consistently followed by the District Courts. E.G. Ayer -vs- General Dynamics Corporation, 82 FRD 115 (SDNY, 1979), Ross -vs- Penn Central Transportation Co.,, 433 F. Supp. 306 (WDNY, 1977). Aldinger -vs- Howard, 427 U.S. 1 (1976) does not destroy the jurisdiction of the Court over the indemnity claim asserted by the Counties against the State. In Aldinger, the Plaintiff attempted to assert an additional State-based claim against a Defendant over whom the District Court had no jurisdiction under 1983 as then construed. Section 1983, I believe it is Title 42, Section 1983. In this case, the Defendant Counties, Third-Party Plaintiffs, are asserting a

claim fashioned in the mode of the Federal common law, (I believe that was the expression used by the Supreme Court) against the Third-Party Defendant State which I find has subjected itself to the jurisdiction of the Court by both the enactment of the Non-Intercourse Act by Congress and, although I don't regard it as necessary, if necessary, its consent to jurisdiction by entering into the 1795 Treaty in violation of that statute.

By enactment of the Non-Intercourse Act, the Congress has abrogated the State's sovereign immunity. The State, by entering into the 1795 Treaty, has consented to subject itself to the jurisdiction of the Federal Court. I think Judge McCurn's case will support that as well. Oneida against State of New York, 520 F.Supp. 1278, 1307-1308.

For me, Parden -vs- Terminal Railroad Co. of Alabama, 377 U.S. 184 (1964) points the way to this result, the States "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce", Parden at 191.

New York, along with the other original signatories to the Constitution, likewise surrendered a portion of their sovereignty by granting Congress the power "to regulate commerce with the Indian tribes", Constitution, Article I, Section 8, Clause 3. Pursuant to the power granted it by the Constitution, the Congress enacted the Non-Intercourse Act of 1790. The Act has not materially changed its pertinent provisions and is now codified at 25 U.S.C. Section 177. In pertinent part if provides, "*No purchase*, grant, lease or other conveyance of lands or of any title or grant thereto, from any Indian nation or tribe of Indians, shall be of *any validity* or equity" unless certain conditions were met. Now, I have underscored no purchase and any validity. It's been found that the 1795 transfer to the State violated the Act. As in Parden, when the Congress said, "*No purchase; any validity*"; it meant what it said and this included the purported grant by the 1795 Treaty, "When a State leaves the sphere that is exclusively its own and

enters into activities subject to Congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation". Parden at 196.

The fact that the Non-Intercourse Act applies to New York, of course, supplies the major premise without which the Judgment in this case could not be sustained. The initial Judgment could not be sustained, if the arguments of the Counties are subsequently accepted that the Act doesn't apply to the State of New York. As the Court held in Parden to hold the State subject to the Non-Intercourse Act but immune from suit would leave the Act meaningless; it would tear the guts right out of it; it seems.

To paraphrase Parden, "It would be a strange situation indeed if the State could be held subject to the " -- I am inserting Non-Intercourse Act -- " and liable for a violation thereof and yet they could not be sued without its expressed consent. The State by " -- and again I am interjecting, procuring the conveyance of the land from the Oneidas so that rephrased Parden would read, "The State by procuring the conveyance of land from the Oneidas and thereby subjecting itself to the Act must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued withot its consent", citing Maurice -vs- State, 43 California Appellate 2d 270 at 275-277, 110 P.2d 706 at 710-711. In my view the fact that Alabama was operating a railroad business for profit in the Parden case doesn't dilute its authority.

In Fitzpatrick -vs- Bitzer 445 U.S. 445 at 451-452, (1976) the Court in distinguishing Edelman said, "Edelman went on to hold that Plaintiffs in that case could not avail themselves of the doctrine of waiver expounded in cases such as Parden -vs- Terminal Railroad Company, 377 U.S. 184, (1964), and Employees -vs- Missouri Public Health Department, 411 U.S. 279, (1973), because the necessary predicate for that doctrine was Congressional intent to abrogate the immunity conferred

by the Eleventh Amendment". The fact that it happened to be the railroad business I think was just a coincidence.

Congress by its enactment of the Non-Intercourse Act and its subsequent re-enactment after the adoption of the Eleventh Amendment, clearly evidences an intent to avoid the amendment's immunity.

As I indicated before, I think under the circumstances disclosed, the provision of the Constitution giving Congress the power to regulate trade with the Indians and the subsequent enactment and re-enactments of the Non-Intercourse Act indicate that New York's consent to this waiver isn't even necessary. Nevertheless, New York has by its conduct consented to jurisdiction in the Federal Court. Consent can be inferred from New York's treaty with the Oneidas. The treaty was executed on September 15th, 1795, about nine months after the ratification of the Eleventh Amendment. As a matter of fact, the State of New York was the first state to ratify the Eleventh Amendment so they quite apparently had a keen interest in the amendment which developed.

Kentucky was the ninth state providing the three-quarters of the states necessary to enact the Eleventh Amendment and they ratified the amendment on December 7th, 1794. At *that* time the amendment, of course, was effective under the Constitution. Article V, Dillon -vs- Gloss, 256 U.S. 368, (1921), held quite clearly that the amendment becomes effective in accordance with the express language of the Constitution upon its ratification by three-quarters of the states.

Now, peculiarly in looking for the effective date of the amendment, it appears that it was, I guess, years, a couple of years later before the President proclaimed the amendment had been ratified by three-quarters of the states. But without going into the questions of the timing I think it is indicative of New York's consent. Particularly treating the earlier action, the ratification date as December 7th, 1794. It would not

materially affect the consent even treating the President's proclamation as the date of the amendment because I think the inference at that time under the old Chisholm case making the Eleventh Amendment necessary would pretty much tell the State that they were subject to jurisdiction of affairs concerning trade with the Indians.

And, incidentally, as my predecessor used an expression, he wouldn't pound the table, and I wouldn't pound the table about this Decision, either. I think it's a very murky area that probably is deserving of much greater study in depth than was afforded either in the presentation or determination of these motions.

In view of my Decision, it really isn't necessary to say much, if anything, about the other statutory alleged bases for a waiver. Section 1541 and Section 10, -- I think there was so much emphasis laid on them in the Briefs that I should comment even though briefly about them.

In Section 1541, the State of New York waives its immunity in an action brought by a person claiming an estate or interest in real property to compel the determination of any *claim adverse to that of the Plaintiff* which the Defendant makes or which the Defendant might make. The State maintains the waiver is inapplicable since the claim brought against it is not within the purview of the section. To my thinking, I think the State is clearly correct on the plain language of the statute. It doesn't appear, or it hasn't appeared to me in all the years that I have been connected with this case that the State makes a claim adverse to the Counties at all. I think they were as solid as a block of granite up to this motion. They both claimed that the State had a valid title and that the State had a valid conveyance from the Oneidas on a number of grounds.

Then the Counties concede, contrary to their position, that this Circuit in Oneida -vs- New York, 443 F.2d 415 (Second Cir., 1971) holds that Section 1541 "Did not constitute consent by the State of New York to be sued in Federal Courts", Counties' Memo Pages 18, 19. They adjure me to disregard Knight because Judge Friendly "noted in his Opinion that the parties had not argued the question: 'in their exceedingly unhelpful Briefs'." They further assert that, "Had he been afforded the benefit of a full adversarial presentation of the issue, it's quite likely he would have reached the opposite result". Counties' Memo Page 19. I can't agree with either conclusion. Judge Friendly pointed out that the parties had omitted from their "exceedingly unhelpful Briefs" a stronger basis than that presented for excluding the action from the reach of the Eleventh Amendment so he immediately set himself up as sort of counsel; he presented the argument. Then he set himself up as a Judge and considered the argument and said that it wouldn't hold.

Now, I think the Counties know that I can't and wouldn't disregard Knight as cavalierly as they indicate I should. A Decision of the Court of Appeals in this Circuit is not persuasive to the District Court; it is binding on it. Hurley -vs- Hurley, 40 N.Y. 2d 78, (1980), does not alter the situation, either. Hurley merely held that the part of the Complaint within Article XV could be maintained in the New York Supreme Court but that the counts seeking damages would have to be relegated to the Court of Claims. I read Hurley a couple of times and nowhere in Hurley do I, can I find that Section 1541 constitutes a waiver of the bar of the Eleventh Amendment to a suit in the Federal Court.

Counsel also rely on Section 1362. I agree with Judge McCurn that 1362, 28 U.S.C. 1362, would form the basis for jurisdiction in an action under that section, but I don't have to rely nor do I rely on that section as the basis of this Decision.

Section 10 of the New York State Law can be disposed of almost summarily. It is without any judicial gloss. Apparently there have been no cases in the Court, at least no reported

cases. From the plain language of the section it seems that the Legislature meant to apply it to actions brought, as one of the conditions, brought for the recovery of land.

Now, the Plaintiffs in this case very pointedly throughout the litigation made it clear that they were not seeking the recovery of land. In one of my earlier Decisions, I distinctly remember crediting the Oneidas and praising them for the, I would say, delicate manner in which they sought to have this question determined with as little disruption as possible. Subsequent cases, when the silk glove didn't work and mailed fists become the mode of the day, sought less peaceable ways of resolving Indian land conflicts. I think the very fact that this was not an action for the recovery of land, certainly in the absence of any judicial gloss on Section 10, excluded it from the coverage of that section. The Legislature could certainly be sustained in their judgment if they sought to cover a situation where the disruptions attendant to an action to recover land was brought and not one which they could reasonably regard as less disrupting where damages only are sought so that -- then go one step further. It's hard for me to conceive that even assuming arguendo as the Counties do that Section 10 constitutes a waiver of the State's immunity to sue, it still falls far short of a waiver of the Eleventh Amendment to suits in the Federal Courts. This is one of the rare times when I think that I have taken longer to state my so-called brief reasons on the record than counsel have taken in presenting their arguments. That in no way reflects on the sufficiency of the arguments because as I indicated earlier the Briefs presented everything that certainly was necessary; that certainly was helpful to the Court.

I thank counsel for their Briefs.

Now, there is one thing accordingly as I indicated, I find that the motion of the State to dismiss should be denied. The motion of the Counties is granted.

Judgment should be entered in favor of the Counties and against the State.

Off the record.

(Discussion off the record.)

THE COURT: I direct, if it meets with everyone's satisfaction, I think that this is probably the best way to do it -- to resolve the question of the entry of Judgment in accordance with the Decision -- if I direct in my Order granting the Third-Party claims Summary Judgment in favor of the Counties and denying the motion of the State that I direct that the attorney for the Counties prepare and present to Mr. Jochnowitz a Proposed Judgment. If you are unable to agree on the form of a Judgment, then present it to the Court within fifteen days; that Judgment can be settled on three days' notice, or if you need longer, five days' notice.

(CONCLUSION OF PROCEEDINGS.)

Appendix M.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v. The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v. THE STATE OF NEW YORK, Third-Party Defendant.	No. 70-CV-35

JUDGMENT ON THIRD-PARTY COMPLAINTS
[OF MAY 19, 1982]

A motion by the Counties of Madison and Oneida, New York, (the "Counties"), as third-party plaintiffs above-named, for summary judgment in their respective favor against the State of New York as third-party defendant on their third-party complaints, having been duly brought on to be heard, and the Court on May 5, 1982 having made an order pursuant

thereto granting the Counties' motion and directing that judgment be entered herein in their favor ordering that the State of New York indemnify the Counties for any sums for which they may be held liable to the plaintiffs, it is hereby

ORDERED, ADJUDGED and DECREED that the Counties of Madison and Oneida, New York, third-party plaintiffs herein, are awarded judgment upon their respective third-party complaints against the State of New York for any portion of the plaintiffs' recovery herein directed or awarded, including any interest thereon, that is paid by either or both of the said Counties, together with interest at the rate of 6% per annum from the date of any such payment.

/s/ Edmund Port
Senior U.S. District Judge

Dated: May 17, 1982
Auburn, New York